

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period
From January 1, 1943
Through March 31, 1943
Volume XXX

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from January 1, 1943, through March 31, 1943.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also provides a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
WILLIAM N. McQUEEN,
Attorney General.

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OPINIONS

January 4, 1943.

Hon. S. E. Boozer,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Poll Tax—Volunteer Fire Company—

Members of Volunteer Fire Company not exempt from poll tax.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of December 7, 1942, has been received, and reads as follows:

"Please give me your official opinion as to whether or not a member of a volunteer fire company of an incorporated municipality is exempt from payment of poll tax."

The poll tax for the State of Alabama is provided for by Section 194, of the 1901 Constitution. Amendment Number 14 to the 1901 Constitution provides for the exemption of veterans of the World War from the payment of the poll tax.

Our statutory provisions concerning poll taxes are found in Code 1940, Title 51, Sections 237 through 248. Section 238 provides for the exemptions from poll tax, and is as follows:

"§238. **Persons exempt in payment of poll tax.**—The following persons shall be exempt from poll tax: All persons permanently and totally disabled from following any substantially gainful occupation with reasonable regularity, and whose taxable property does not exceed five hundred dollars, provided that proof of such disability is made to the probate judge of the county in which such person resides between October the first and the following February the first. And the name of no such exempt person shall be placed on the list of qualified voters after the first day of February and before the first day of the next October. All persons who honorably served in the military or naval service of the United States between January 1, 1917 and November 11, 1918 shall not be required to pay such poll taxes. The judges of probate shall issue certificates of exemption from the payment of such poll taxes to the persons entitled thereto under such rules and regulations as may be prescribed by the governor. Every officer and enlisted man of the national guard or naval militia of Alabama shall be exempted from poll taxes during his active membership and every person who shall have served an aggregate of twenty-one years in the active national guard or naval militia of Alabama shall be exempt from poll tax. The certificate of exemption shall be obtained as provided for in section 11 of Title 15 of this Code."

I am unable to find any constitutional provision or general statute exempting the members of a volunteer fire company from the payment of the poll tax. The poll tax being levied for the State, it is apparent that any municipal ordinance or local act attempting to exempt members of a volunteer fire company would be unconstitutional and void.

Therefore, the premises considered it is my opinion that volunteer firemen are not exempted from the payment of poll tax.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 4, 1943.

Hon. Robert M. Hill,
Associate Member,
State Board of Pardons and Paroles,
Montgomery, Alabama.

Board of Pardons and Paroles—Pardons and Paroles—Bastardy—
Code 1940, Title 6, Sections 15, 16—

1. The State Board of Pardons and Paroles is not authorized to grant paroles or pardons to persons imprisoned under a judgment of the circuit court in a bastardy proceeding.

2. Person serving a sentence of imprisonment in a bastardy proceeding entitled to release therefrom upon payment of costs and execution of bond for support of bastard child as provided by Code 1940, Title 6, Sections 15, 16.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of December 14, 1942, is as follows:

“On January 10, 1940, the attorney general ruled that ‘Courts sentencing persons for non-support of wife or children retain jurisdiction of such cases and have continued jurisdiction thereof.’ The effect of this ruling is that the Alabama State Board of Pardons and Paroles has no authority or control in such cases, but that the trial court retains jurisdiction for the purpose of effecting release or parole.

“We should like to be advised if the same is true in bastardy cases. As we understand it, the conviction and incarceration in bastardy cases

is primarily for the benefit of the child. Bastardy and non-support cases, therefore, bear a close resemblance to the general purposes to be served by the prosecution.

"Does this Board have the authority and jurisdiction to order release on parole or does the trial court have continued jurisdiction for this and other purposes on those undergoing imprisonment and extending throughout the entire term of the sentence?"

The statute, Code 1940, Title 6, Sections 1-24, regulating bastardy cases, provides for commencement of proceedings upon complaint of the mother (Section 1); and for trial in the circuit court of the one issue of fact whether defendant is father of the expected or existent illegitimate child, as the case may be, (Sections 4, 7, 12).

If at the trial the issue is "found against the defendant, judgment must be rendered against him for the costs, and he must also be required to enter into bond with surety *** conditioned to pay the costs of the proceedings, and such sum, not exceeding one hundred dollars a year, as the court may prescribe, on the first Monday in January in each year, for ten years, to the judge of probate of the county, for the support and education of the child ***" (Section 12).

Section 13 provides that:

"On failure to give such bond, the court must render judgment against the defendant for such sum as, at legal interest, will produce the amount directed to be paid yearly; and he must also be sentenced to hard labor for the county for one year, unless in the meantime, he executes the bond required, or pays the judgment and costs. If the defendant is sentenced to hard labor, the proceeds of his hire or labor shall be paid to the judge of probate for the support and education of the child, as is provided in Section 12 of this title."

Execution may issue on the bond upon default as to any annual payment, (Section 14); and if the bond required to be made as aforesaid is made at any time before defendant's term of imprisonment expires, defendant must be discharged from further imprisonment on payment of costs, and "the judgment against him is discharged." (Sections 15, 16.)

Section 17 provides for judgment by default against defendant, and in that case he may be discharged from imprisonment under said judgment upon payment thereof, or upon execution of bond as provided in Section 12.

All money collected upon forfeiture of defendant's appearance bond, or upon the judgment against him must be paid to the custodian of the county funds, and the interest thereon must be paid to the judge of probate "for the support and education of the child," (Section 19); and the judge of probate pays the same "to the mother or other person having the custody of the child, for its maintenance and education," (Section 21).

Finally it is provided that the bond required to be given for support of

the child for ten years and the judgment requiring annual payment to be made for such purpose must be declared void and vacated, and the defendant discharged, in the event (a) the child is not born alive, (b) dies, or (c) its parents marry. (Section 22.)

From the judgment of the circuit court, whether for or against defendant, an appeal will lie. (Section 24.)

Thus it appears that bastardy cases have none of the features of ordinary criminal prosecutions for felonies and misdemeanors. They are governed by the procedure pertinent to civil actions. **Williams v. State**, 117 Ala. 199, 23 So. 42; **Lusk v. State**, 124 Ala. 94, 27 So. 414; **Bell v. State**, 124 Ala. 94.

Imprisonment of defendant upon failure to comply with the order of the court for support of his child is authorized only as a means of enforcing the order of the court and the natural duty of a father to provide for his offspring, to some extent at least. **Paulk v. State**, 52 Ala. 427; **Yarbrough v. Judge, Shelby Co. Court**, 15 Ala. 556, 7 C. J. 1003(99); **State v. Humber**, 67 Ala. 81.

Likewise control of the proceedings is within the power of the complaining expectant or existent mother, who may before final judgment dismiss the same by entering of record an admission that provision satisfactory to herself for the child's support has been made. **Martin v. State**, 62 Ala. 119; **Wilson v. Judge, Pike Co. Court**, 18 Ala. 757.

Forbearance to institute bastardy proceedings will operate as a valid consideration for a promissory note. **Merritt v. Fleming**, 42 Ala. 234.

I am of opinion, therefore, that in view of the foregoing the statutory powers of the State Board of Pardons and Paroles should not by construction be extended to include supervision over persons imprisoned by virtue of judgment rendered in the circuit court in bastardy proceedings. True it is that "the board shall be charged with the duty of determining what prisoners serving sentences in the jails and prisons of this State may be released on parole and when and under what conditions." Code 1940, Title 42, Section 2.

A careful reading of the statute in its entirety, however, (Code 1940, Title 42, Sections 1-18) leads to the conclusion that the words "prisoners serving sentences" should be restricted to prisoners in the ordinary acceptance, to wit, persons convicted of some criminal offense, whether a misdemeanor or a felony, as to whom criminal records are kept.

It is to be noted that the statute expressly disclaims any intention to interfere with juvenile and domestic relations courts, juvenile courts, and courts of like jurisdiction. Title 42, Section 18.

The words "prisoners serving sentences in jails" might be stretched to include persons sentenced for contempt of court, for violating injunctions or failure to pay alimony as ordered by a decree of divorce, yet it could hardly be contended that such persons come within the purview of the statute regulating pardons and paroles.

Inasmuch therefore as "bastardy" is not a crime and the sole object of "bastardy proceedings" is to provide support for the bastard child, and it is also expressly provided that defendant in a bastardy proceeding may at any time pending imprisonment obtain his release therefrom by complying with the order of the court, to wit, execution of a bond and payment of costs, I think it would do violence to all sound principles of construction to hold that the Board of Pardons and Paroles has also acquired jurisdiction, so to speak, of such cases.

Otherwise the bastardy statute is largely repealed, in effect by implication, if the Board under its powers of parole may interfere with the express provisions and destroy or impair the rights of bastard children to maintenance and support.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 7, 1943.

Hon. John Lapsley, Commissioner,
State Department of Revenue,
Montgomery, Alabama.

Refund on Taxes erroneously paid to State.

1. Section 913, Title 51, Code of Alabama 1940, is a matter of grace and confers upon the taxpayer a privilege only. It does not create a vested right. The legislative power to withdraw or extend that grace and privilege is commensurate with the power to confer them.

2. The provision in second paragraph of Section 913, Code of Alabama 1940, declaring, "such application must be made within two years from the date of such payment," is not a statute of limitation. It is a condition attached to the privilege conferred. It is, therefore, retrospective and prospective in its application and operation.

3. Application for refund made after effective date of 1940 Code based on payment made more than one year before effective date of said Code, but less than two years next preceding said application, if otherwise sustained, should be approved.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Your request for official opinion bearing date of December 21, 1942, is as follows:

"Prior to the enactment of the 1940 Code the limitation for filing claims for refund of taxes under the provisions of the Act approved July 17, 1931 (General Acts of Alabama 1931, p. 527), was one year from the date of the payment of the tax. In the codification of this law, such time limit has been amended to read two years from the date of the payment of the tax.

"A question has arisen as to whether, since the effective date of the Code, an application for such refund may be approved with respect to a tax paid through error or mistakes within two years from the date of the filing of the application, or whether, with respect to taxes paid through mistake or error prior to the effective date of the Code, the limitation of one year should be applied. In other words, if the time for filing the claim under the former Act had expired, whether it would be necessary to deny the claim or whether its approval would be governed solely by the amended statute.

"You are, therefore, respectfully requested to advise whether or not the approval of application for refund filed since the effective date of the 1940 Code, with respect to taxes erroneously paid prior to such date, is governed by the amended statute incorporated in Section 913, Title 51, Code of Alabama 1940, or if a claim which would have been barred under the original Act may not now be approved even though filed within two years from the date of payment."

The answer to your inquiry calls for a consideration of the effect, if any, of Section 913, Title 51, Code of Alabama 1940, upon a petition or application for a refund of the excess amount of taxes or license paid by a taxpayer directly to the Department of Revenue by mistake of fact or law before the effective date of the Code of 1940 and more than one year prior thereto. In arriving at a correct conclusion it is necessary to revert to law of Alabama which controlled the subject of inquiry prior to the effective date of the Code of Alabama 1940 and note the change in that law made by Section 913, *supra*. That law was embodied in Act No. 432, approved July 17, 1931, General Acts of Alabama 1931, page 527. Section 2 of said Act is as follows:

"Before any refund under this Section can be made the taxpayer, his heirs, successors or assigns, shall file in duplicate, petition directed to the State Tax Commissioner setting up the fact relied on to procure the refunding of the money erroneously paid. Such application must be made within twelve months from the date of such payment."

Section 2 of said Act, as amended or changed, appears as the second paragraph of Section 913, Title 51, Code of Alabama 1940, and is as follows:

"Before any refund under this section can be made the taxpayer, his heirs, successors or assigns, shall file in duplicate, petition directed to the

department of revenue, setting up the fact relied on to procure the refunding of the money erroneously paid. Such application must be made within two years from the date of such payment."

This Code section follows the wording of the 1931 Act, *supra*, except that it changes the time for making the application for the refund from twelve months to two years from the date of such payment, and provides that the Comptroller rather than the State Auditor draw the warrant for the amount certified to him. The words "department of revenue" are also substituted for the words "State Tax Commissioner."

The question now arises does the section of the 1940 Code, above cited, operate retrospectively so as to allow the making of an application for such refund after the effective date of the 1940 Code of Alabama where the payment of the excess taxes or license or erroneous payment was made more than twelve months prior thereto and less than two years prior thereto? In other words if due to the elapse of more than twelve months after the making of such payment a taxpayer was prevented from making such application under the provisions of the 1931 Act, *supra*, could he make such application after the effective date of the 1940 Code if made within two years after the date of such payment?

It is a general rule that when a time for bringing action is provided in a statute creating the right of action, the statute is not one of limitation, the time limit being merely one of the conditions of liability.

"Where the cause of action involved is one created by statute and the time for commencing the action is a condition of liability, it is not a statute of limitations and will operate retrospectively if a contrary intention is manifest."

37 C. J. 693.

This general statement of the rule in *Corpus Juris* is supported by Alabama decisions relating to the time limit required in such statutes such as those providing for will contests, suits against the State, and actions or claims for refund of taxes.

In the case of the *First National Bank of Scottsboro v. Jackson County*, 227 Ala. 448, 150 So. 690, is a full discussion of the nature of statutes providing for tax refunds and of the effect of their stipulations as to time limit. The Bank of Scottsboro contended that the 1931 statute (Gen. Acts 1931, p. 811), amending Section 3146 Code of 1923 by changing the time within which proceedings could be brought to recover erroneously paid taxes from six years to one year after the payment of the same was not retroactive as to taxes paid prior to the enactment of the statute. In this connection I quote from the opinion of the court as follows:

"(2) Plaintiff's last payment was made January 20, 1931. The present action was commenced on October 11, 1932. As originally enacted, the statute permitted a recovery within six years from the date of payment. Section 3146, Code of 1923. But by the Act approved July 28, 1931 (Gen-

eral Acts 1931, p. 811), this section was rewritten with the single change of a substitution of one year in the place of six for the commencement of the suit, and it appears the present suit was brought more than one year after the approval of the amendatory act. This section and the two preceding constituted one act (General Acts 1907, p. 639), and were codified therefrom.

"(3) A county is a mere political subdivision of the state, and no right to a suit against it exists except by statute. *Ex parte State*, 52 Ala. 231, 23 Am. Rep. 567; *Hamilton v. Jefferson County*, 209 Ala. 517, 96 So. 628. Prior to the enactment of what is now section 181 of the Code 1923, the county was not subject to suit, and since that time and prior to the enactment here in question, any such suit was subject to the limitations of the present Code, section 228. *Lowndes County v. Hunter*, 49 Ala. 507.

"By the Act of 1907 (sections 3144-3146, Code 1923), therefore, the Legislature granted to taxpayers, who paid their taxes under an invalid law, a new privilege or benefit, for prior thereto no action would lie for taxes voluntarily paid. *Raisler v. Mayor, etc., of Athens*, 66 Ala. 194; *Gachet v. McCall*, 50 Ala. 307.

"As said in *Luke v. Calhoun County*, 56 Ala. 415: 'The legislature has full power to take away by statute rights, not vested, which have been conferred by statute.' See also, *Blake v. State*, 178 Ala. 407, 59 So. 623. And speaking of the repeal of a statute conferring a right to sue the state, the court, in *Ex parte State of Alabama*, 52 Ala. 231, 23 Am. Rep. 567, said: 'Such statutes are matters of grace, confer privileges,—they do not create rights. *** The power to withdraw is commensurate with the power to confer, and when the privilege is withdrawn, the citizen is remitted to the condition in which he stood when it was conferred.'

"'When a right by statute is not by nature a vested right and at the time of the repeal of the statute is still inchoate *** it will fall with the statute, unless expressly excepted.' 59 *Corpus Juris* 1188.

"Illustrative of this general rule is the case of *Ex parte State of Alabama*, 52 Ala. 231, 23 Am. Rep. 567, where it was held that the repeal of the law authorizing suits against the state strips a court, in which such a suit is pending, of all jurisdiction to proceed further in the cause, and wherein was quoted with approval the following expression from *Beers v. State of Arkansas*, 20 How. 529, 15 L. Ed. 991: 'This permission (to sue the State) is altogether voluntary on the part of the sovereignty; it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.'

"(4) So in the instant case the Legislature has granted to the taxpayer a new privilege to sue the county under such conditions and restrictions, among them, as originally enacted, a requirement that the suit be brought within six years. But the amendment in the Act of 1931 changes this period to one year, and we think the amended act is here to be construed as if the statute had been originally enacted in this

amended form. 59 Corpus Juris 1096."

With further reference to this subject I have taken the following excerpt from the opinion written by Judge Rice in the case of *Lee v. Cunningham*, 27 Ala. App. 461, 176 So. 475:

"(1) It seems that the whole matter of procuring a refund of licenses erroneously paid, such as gave rise to the instant proceeding, is one of legislative grace, and that it was within legislative competency to take away the 'jurisdiction of the courts' with reference to petitioner's claim, even if it be said that, when his application to the probate judge of Mobile county was made, the 'courts had jurisdiction,' at any time it chose. And petitioner could not complain his claim being still 'inchoate.' See *First National Bank of Scottsboro v. Jackson County*, 227 Ala. 448, 150 So. 690.

"(2) We read the sections cited, of the act, above, which went into effect on October 1, 1935, as doing more than merely providing a 'limitation of one year' within which rights given thereby must be asserted (claimed). We are persuaded that the situation presented is not that governed by the law that 'a statute of limitations, to be available, must be pleaded' (See *Russell v. Garrett*, 204 Ala. 98, 85 So. 420); but that, the fact that the application must be made 'within one year from date such license is paid' is jurisdictional. If said application is not so made, no jurisdiction exists."

On certiorari to the Court of Appeals the Supreme Court of Alabama in the above styled cause, 234 Ala. 639, 176 So. 477, had this to say:

"(6) It is well settled that the right to reclaim money voluntarily paid to the state or the counties thereof, as taxes, is a creature of legislative grace which the Legislature may restrict or limit by future legislation. *First National Bank of Scottsboro v. Jackson County*, 227 Ala. 448, 150 So. 690.

"(7) The judgment here is that the effect of carrying forward the provisions of section 375 of the general revenue law of 1919 (Gen. Acts 1919, p. 445) into the general revenue law of 1935 (Acts 1935, p. 563, § 366, with the restriction on said right, applies to all cases not closed by a refund of the money prior to the change, and as held in the cited case, the statute as re-enacted is to be construed and applied as though it had been originally enacted with such restrictions of the right."

The opinion of Justice Foster in the case of *Tronheim v. Loveman*, 225 Ala. 199, 142 So. 550, is of importance to the above thought and for the further purpose of clearly distinguishing the statute we are now considering from a statute of limitations. The following excerpt from that opinion is quoted:

"(1) The will was probated March 26, 1931. The contest was filed in equity March 25, 1932. This was within one year as authorized by section 10637, Code. But on August 1, 1931 (Acts 1931, p. 844), the Legislature amended that section so as to change the period in which the contest

could be instituted from twelve months to six months after the probate of the will. So that the question is whether this contest is controlled by the law in existence when the right to contest accrued, or that in existence when the suit was filed. That depends upon whether the right to sue within twelve months became irrevocably vested when it accrued. We are therefore remitted to a consideration of the character of such right. It has been heretofore defined by this court to be a new, substantive, and independent right, provided it is exercised within the period prescribed; not as a statute of limitation, but as descriptive of the right of action. *Kaplan v. Coleman*, 180 Ala. 267, 276, 60 So. 885; *Wachter v. Davis*, 215 Ala. 659, 111 So. 917. To the same effect is *Carlin v. Peerless Gas Light Co.*, 283 Ill. 142, 119 N. E. 66; *Hartray v. Chicago Rys. Co.*, 290 Ill. 85, 124 N. E. 849. See also, as analogous, *Ex parte Walter*, 202 Ala. 281, 80 So. 119; *Knox v. Paull*, 95 Ala. 505, 11 So. 156.

"(2) The statute of limitations, as such is remedial in its purpose and effect, and any changes in such statute may or may not have a retroactive effect so as to change the limit in the time in which suit may be brought or an existing cause of action not then barred, provided it is clear that it was intended to be retroactive, and provided a reasonable time was extended after its enactment in which suit may be instituted. *Henry v. Thorpe*, 14 Ala. 103, 113; *Doe v. Haskins*, 15 Ala. 619, 50 Am. Dec. 154; *Cox v. Davis*, 17 Ala. 716, 52 Am. Dec. 199; *Rawls v. Doe ex dem. Kennedy*, 23 Ala. 240, 48 Am. Dec. 289; *Martin v. Martin*, 35 Ala. 560; *Bedell v. Smith*, 37 Ala. 619, 625; *Bradford v. Barclay*, 42 Ala. 375; *Harrison v. Heflin*, 54 Ala. 552; *Birmingham v. Doster-Northington*, 207 Ala. 542, 93 So. 475; 37 *Corpus Juris* 691; *Hathaway v. Merchants' L. & T. Co.*, 218 Ill. 580, 75 N. E. 1060, 4 *Ann. Cas.* 164; 17 *R. C. L.* 676.

"(3) It is clear that, when a statute creates the right to a new proceeding or a new right of action, it is entirely within the legislative control and is not vested either in respect to its use or in respect to the time in which the right to its use is fixed as a condition thereto. The rule has been applied to the time in which a statutory appeal may be prosecuted, which is called a new proceeding and not a continuance of the old, so that a change in the time of taking an appeal may apply to existing judgments, or the right to appeal may be repealed and annulled so as to apply to such judgments. *Coker v. Fountain*, 200 Ala. 95, 75 So. 471; *Tennessee River Nav. Co. v. Grantland*, 199 Ala. 674, 75 So. 283; *Medical College v. Muldon*, 46 Ala. 603; *Hyde v. Parks*, 221 Mo. App. 675, 283 S. W. 727; *Mazange v. Slocum*, 23 Ala. 668."

These Alabama decisions are in line with leading cases in other states.

Spaulding v. White, 50 N. E. 224.

Carlin v. Peerless Gas Light Co., 119 N. E. 66, 283 Ill. 142.

And the Federal Courts have likewise so construed the law.

Seaman v. Bowers, 297 F. 371 (C. C. A. New York)

Public Service Co. v. Herold, 279 Fed. 352.

Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. Ed. 1265.

In the light of the above authorities I am of the opinion, and so hold, that Section 913, Title 51, Code of Alabama 1940 is a matter of grace and confers upon the taxpayer a privilege only. It does not create a vested right. The legislative power to withdraw or extend that grace and privilege is commensurate with the power to confer them. The provision in second paragraph of said section declaring, "Such application must be made within two years from the date of such payment" is not a statute of limitations. It is a matter of jurisdiction. It is one of the conditions attached to the privilege conferred by the statute upon the taxpayer to obtain a refund as provided therein. It is, therefore, retrospective and prospective in its application and operation. It applies to payments made prior to the effective date of the Code of Alabama 1940 and to those made thereafter.

Applying the above to the inquiry presented I am of the opinion that an application made by a taxpayer after the effective date of the Code of Alabama 1940, based upon an excess payment or erroneous payment of a license or taxes made at such time prior to the effective date of the Code of Alabama 1940 that the application for a refund thereof would be barred under the twelve months provision of the Act approved on July 17, 1931, General Acts of Alabama 1931, page 527, but which payment was made within two years next preceding the making of said application, if otherwise sustained, should be approved under the terms and conditions of Section 913, Title 51, Code of Alabama 1940.

The opinion of the Attorney General of Alabama rendered on July 3, 1942, to Hon. John C. Curry, Commissioner of Revenue, Capitol, Quarterly Report Attorney General of Alabama, July 1, 1942-September 30, 1942, Vol. XXVIII, page 10, is withdrawn and amended so far as the same is inconsistent with this opinion.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 8, 1943.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Courts of County Commissioners—Houston County—Quorum—

1. Three members, including the Probate Judge, constitute a quorum.
2. Probate Judge or Chairman has a vote only where court is divided.
3. Unlawful for a member to consider or vote on contract with persons related to him within the fourth degree.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of December 28, 1942, has been received and is as follows:

"Please refer to Local Acts 1935, page 251, Act No. 437, and to Local Acts 1939, at page 133, Act No. 240, and advise me as follows:

"1. How many members of the Four Member Board, with the Probate Judge as Member and Chairman, does it take to pass a resolution or to make an appropriation, or to elect a County Road Foreman?

"2. If one of the members is absent or otherwise disqualified to vote on any matter where relationship or personal interest is involved, and there are two members that are favorable to a question, one member against and one disqualified, can the two members elect or pass a resolution or do any other act that will constitute the will of the Board?

"3. Does the Chairman have a vote in any case except where there is a tie, two and two?

"4. Is a member disqualified to vote for or against a Road Foreman by reason of relationship, and if so in what degree?

"5. If there is a majority of the Board present, three members, and two of them vote for a proposition, and one against, does the Chairman in that event have a vote, and if not, does the two member affirmative vote legally carry the question?"

Section 4 of Act No. 240, S 294 (Local Acts 1939, page 133) provides in part as follows:

"Section 4. That there is hereby conferred upon said Board of Revenue of Houston County, Alabama, and the members thereof, all of the general authority, powers and duties now provided or which may hereafter be provided to Board of Revenue or Commissioners Court, under the general laws of the State of Alabama, and amendments thereto not inconsistent with the provisions of this Act, *** "

It is to be noted that the Board of Revenue of Houston County is composed of the Probate Judge and four other members (Section 1 of Act No. 240, supra). Courts of county commissioners that are governed wholly by the general laws of the State are likewise composed of the Judge of Probate and four other members, (Code of 1940, Title 12, Section 5). In view of this fact and the fact that there is nothing in Act No. 240, supra, to the contrary, it is my opinion that Title 12, Section 8 of the 1940 Code determines what constitutes a quorum of the Board of Revenue of Houston County. Title 12, Section 8 provides as follows:

"§8. **Quorum of court.**—The court may be held by the judge of probate and two commissioners, or with three commissioners without the judge of probate."

Therefore, in answer to your first inquiry, it is my opinion that the probate judge and two other members or three members without the probate judge constitute a quorum, and the affirmative vote of any two of such members would be sufficient to constitute the action of the Board. **Biennial Report of Attorney General, 1928-30, page 756.**

It follows that the answer to your second question is in the affirmative.

In connection with your third question: "Does the Chairman have a vote in any case except where there is a tie, two and two?", your attention is called to Code 1940, Title 12, Section 21, which provides as follows:

"§21. **Proceedings if court divided.**—In all matters where the court is divided, the same must be determined by the judge of probate."

In the case of *Fountain v. State*, 210 Ala. 51, 97 So. 59, it was said:

"These conclusions rest upon section 3316 of the Code, which appears to intend that in the allowance or disallowance of claims against the county the judge of probate has no voice unless the other members of the board are equally divided."

Section 3316 of the 1907 Code, referred to in the above quotation, has been brought forward through the 1923 into the 1940 Code as Title 12, Section 21, supra, without change.

Therefore, the premises considered, it is my opinion that the probate judge does not have a vote except in case of a tie. The tie could, however, be one and one as well as two and two. **Biennial Report of Attorney General, 1928-30, page 709.**

In answer to your fourth question, your attention is directed to Code 1940, Title 12, Section 29, which provides as follows:

"§29. Letting contracts to relatives or employing relatives of commissioners, board of revenue or similar governing body, penalty for.—Any member of any commissioners' court, board of revenue or similar governing body who shall award any contract in which the county of such commissioner or member of board of revenue or similar governing body is interested to any person related, either by blood or marriage within the fourth degree to such commissioner or member of board of revenue or similar governing body, or who shall employ any such relative to do any work for said county, or to act as agent for any such member in any work in which such county is interested, shall be guilty of a misdemeanor and, on conviction, shall be fined not less than ten dollars nor more than one hundred dollars."

In the case of *Garrison v. Sumners*, 223 Ala. 17, 134 So. 675, the Supreme Court in construing the above-quoted section said:

"(3) Applying as well as we may the foregoing rules of construction to the act in question, the court here is of opinion that the criminal penalty provided by the statute applies to the individual members of the court of county commissioners—meaning that the individuals composing the courts of county commissioners (or the boards of revenue in counties having such boards) are prohibited under criminal penalty to let contracts to persons related to them within the degree denounced by the statute or to sit as members of the court **when considering or voting upon** any county contract with any person so related to the individual member.

It is, therefore, my opinion that members of the Board of Revenue of Houston County should not sit as members of the Board when the Board is considering or voting upon the employment of a road foreman who is related to such member within the fourth degree. **Biennial Report of Attorney General, 1922-24, pages 257 and 438. Biennial Report of Attorney General, 1934-36, page 165.**

In connection with your fifth question, it is apparent from the foregoing that in such a situation the Chairman would not have a vote and that the two member affirmative vote would carry the question.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 13, 1943.

Hon. H. M. Touart,
Tax Assessor,
Mobile County,
Mobile, Alabama.

Tax Assessor—Assessment Books—Department of Revenue—Code
1940, Title 51, Section 62—

Tax Assessor of Mobile County required to prepare assessment
book as required by Code 1940, Title 51, Section 62.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for my official opinion bearing date of January 7, 1943, is
as follows:

"I would like to have an official opinion as soon as possible, as to
whether or not the Tax Assessor of Mobile County is required to make
up a book of assessments, where the assessment sheets are bound in book
form, and where an abstract is furnished the Tax Collector, for the col-
lection of taxes.

"I have in this county, up until the present assessing year, some
twenty-seven thousand assessments, and for this year, that is for the
1943 return, there will be an approximate increase of six thousand more.
The book of assessments that I have been making in this county requires
four volumes, with five hundred pages to the volume, and the transferring
of the descriptions from the bound assessment sheets to these books, re-
quires the full time of four clerks for approximately five months. The
cost of making these books by the printer is in the neighborhood of one
thousand dollars, and the weight of each volume runs from two hundred
and fifty to three hundred pounds.

"In talking with Mr. Russell Hungerford, with the examining de-
partment of the state, he was of the opinion that this work of making
the assessment books was unnecessary as these assessment books are an
identical copy of the bound assessment sheets.

"What I would like for you to render an opinion on is, if it is not
possible for me to operate under the Uniform System Act approved Feb-
ruary 8th, 1935, setting up the same system used in all the other counties
in this state, that is, the abstract book and bound assessment sheets to
replace the book of assessments that we are now writing.

"I note that on April 21st, 1936, your office rendered an opinion to
G. B. Smith, Tax Assessor of Elmore County, in reference to making
assessment books, and in this opinion you held that unless required by
a local law it would not be necessary to make this assessment book.

"Under date of April 19th, 1933 there was passed, in extra session, a Sossaman Bill which I think is a general bill with local application. This bill is not a local bill as same was never advertised in any of our local newspapers. In my opinion the Uniform System Bill approved on February 8th, 1935, repeals the Sossaman Bill.

"I would appreciate very much an early opinion in this matter as the assessment period closes the third Monday in January and with the increased assessments, as stated above, it will require the full time to have the work in order that I may be able to furnish an abstract at the proper time."

The tax assessor of each county (Jefferson County excepted) was required by Section 42 of Act No. 172, H-294 (General Acts 1923, page 152) to prepare an assessment book. Shortly after the passage of this act there were passed several local acts making the Jefferson County Method applicable in other counties. The Legislature then in 1932, apparently realizing the confusion that existed due to the number of local laws that had been passed on this subject relieved tax assessors from making this book of assessments except where provided otherwise by local law. Act No. 83, S-175, approved October 11, 1932, (General Acts 1932, page 93).

There being at this time no local law specifically requiring Mobile County to make a book of assessments, the tax assessor of Mobile County was, in my opinion, by this act relieved of the duty of making an assessment book. Biennial Report of Attorney General, 1934-36, page 638.

During the 1933 session of the Legislature, the Legislature passed Act No. 155, H-449, approved April 19, 1933, (General Acts 1933, page 143), a general act of local application, applicable only to Mobile County which act required the Tax Assessor of Mobile County to make a book of assessments. This act used language similar and identical in legal effect to that used in Section 42 of the 1923 Act, *supra*. This act superseded the 1932 act, *supra*, in so far as Mobile County was concerned, and undoubtedly required the Tax Assessor of Mobile County, from and after the date of its approval, to prepare an assessment book.

Such was the status of the law in regard to Mobile County when the 1935 Revenue Act was passed. Section 55 of this act which provides for the assessment book and which is found on page 285 of the General Acts of 1935, provides as follows:

"Section 55. The Tax Assessor must make and enter in an assessment book, suitably ruled and substantially bound, in forms as prescribed by the State Tax Commission, a condensed statement of all assessments made during each tax year, showing in separate columns the name of the owner, a description of the real estate and improvements thereon, the assessed value thereof, and the value of the personal property assessed for taxation; and the assessor shall compute and enter opposite the name of each taxpayer the aggregate amount of State, county and special taxes with which such taxpayer is charged. When the hearing of objection to assessments has been completed as herein provided, the Tax Assessor shall complete the said book by making the proper entries therein,

and foot up at the bottom of each page the aggregate of all such taxes. When appeals have been taken to the circuit court, as herein provided, this fact must be stated. Provided that in counties where assessors are now allowed by law to use assessment lists in lieu of a book of assessments, the assessor shall not be required to prepare a book of assessments as provided for in this Section but in lieu thereof shall be required to arrange in alphabetical order original assessment lists, and cause the same to be permanently bound, and such assessment lists when bound, shall constitute the book of assessments as herein provided, and the certificate of the State Tax Commission, or the agent or assistant thereof provided for in the next section, shall be entered upon each of said bound volumes of assessments. Such assessment lists when bound shall be preserved permanently as a matter of record. In making the tax collector's abstracts, such abstracts shall be made direct from the assessment lists."

It will be noted that Mobile County does not come within the proviso of this section due to the fact that its tax assessor at the time of the passage of his act was required to make an assessment book.

I cannot agree that Act No. 26, H-49, approved February 8, 1935, (General Acts 1935, page 43) the Uniform Accounting System Act had the effect of repealing Act No. 155 (General Act 1933, page 143, supra). The Uniform Accounting System Act merely provided that the forms to be used in various counties should be uniform and cannot, in my opinion, be construed to relieve county officials of a duty specifically imposed upon them by law.

Repeal by implication is not favored and if two statutes may be reasonably construed so as to leave a field of operation for both, such construction should be given. **Mills v. Court of Commissioners of Conecuh County**, 204 Ala. 40, 85 So. 564. **Alabama Digest**, "Statutes," Key No. 158.

Section 55 of the 1935 Revenue Act has been brought forward into the 1940 Code as Title 51, Section 62. The only change made in bringing this act forward was occasioned by the change of the name of the State Tax Commission to the Department of Revenue. It is to be noted from Title 51, Section 62 that the tax assessor must make an assessment book in forms as prescribed by the Department of Revenue.

Therefore, the premises considered, it is my opinion that you are required to make an assessment book as provided for by the first part of Title 51, Section 62, "in forms as prescribed by the department of revenue."

Whether or not the type of assessment book mentioned in your inquiry would be in forms as prescribed by the Department of Revenue, I do not know. You should, if you have not already done so, take this matter up with the Department of Revenue and have them prescribe the form in which your assessment book should be prepared. It may be that they can prescribe a form less burdensome than the one outlined in your inquiry.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 21, 1943.

Hon. W. L. Pratt,
Judge of Probate,
Bibb County,
Centreville, Alabama.

Public Offices—Vacancy—Failure to file bond.

1. The failure to file bond as required by law on or before September 1, 1943, by tax assessor-elect, though such failure is due to death before such date, creates a vacancy which will exist on September 2, 1943, and thereafter, in the term beginning on October 1, 1943.

2. Such vacancy is provided for by the law of the State of Alabama and Section 215, Title 17, Code of Alabama, 1940, providing for special elections does not apply.

3. The Governor of Alabama on and after September 2, 1943, will be vested with authority to fill such vacancy which may be exercised upon the officer in whose office such bond is required to be filed certifying such failure to file said bond to the Governor as provided by Section 47, Title 41, Code of Alabama, 1940.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Your letter of January 5, 1943, in which you request my opinion, is as follows:

"Recently the office of the Tax Assessor of Bibb County was made vacant by the death of the Tax Assessor. Leland Pierson, son of the late Tax Assessor was appointed to fill the unexpired term which expires September 30th, 1943. Will you please advise me how the full time, which begins October 1st, 1943, and which term the late Tax Assessor was elected but had not made bond, is to be filled. Does the Governor make an appointment, or is an election to be held, and if an election is to be held, does the Governor call said election and if he does not, who is authorized to call the election and set the date, and at what time is said election to be held?"

Your inquiry calls for a consideration of the laws of Alabama relating to vacancies in public offices and those relating to the method by which such offices are filled under the facts causing the vacancy.

Section 160, Title 41, Code of Alabama 1940, provides:

"§160. How offices are vacated.—Any office in this state is vacated:

"By the death of the incumbent.

"By his resignation, except in such cases as are excepted by law.

"By ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed.

"By the decision of a competent tribunal declaring his election or appointment void, or his office vacant.

"By the act of the legislature abridging his term of office, when the same is not fixed by the constitution.

"In such other cases as are or may be declared by law."

It is to be noted that none of the provisions of that section cover the facts presented by your inquiry. But under the last sentence of that section, which declares that, "In such other cases as are or may be declared by law" the office would be vacated. That, of necessity, directs our attention to other declarations of the law with reference to vacancies.

Sections 161-164, inclusive, of Title 41, Code of Alabama 1940, relate to vacancies in certain public offices under the facts upon which those sections are based. And Section 198 of Title 41, Code of Alabama 1940, provides for a vacancy in cases of impeachment. None of the vacancies established by those sections of the law cover the facts presented by you for consideration.

Section 47, Title 41, Code of Alabama 1940, is a legislative declaration of a vacancy in a public office upon the failure of any officer required by law to give bond to do so and file the same within the time fixed by law. That section is as follows:

"§47. Failure to file bond vacates office.—If any officer required by law to give bond fails to file the same within the time fixed by law, he vacates his office; and in such case, it is the duty of the officer in whose office such bond is required to be filed, at once to certify such failure to the appointing power, and the vacancy must be filled as in other cases."

The Tax Assessor in every county in this State is required by law to execute and file a bond as is required by law. Section 79, Title 41, Code of Alabama 1940, provides:

"§79. Tax assessor.—The tax assessor in every county in the State of Alabama shall, before entering upon the discharge of the duties of his office as tax assessor, execute in duplicate a bond in the sum of not less than five thousand dollars. Such bonds shall be payable to the State of Alabama, with sufficient surety or sureties to be approved by the judge of probate, and conditioned faithfully to discharge the duties of his office, which are, or may be required by law during the time he continues therein, or discharges any of the duties thereof. One of such duplicates must be filed and recorded in the office of the judge of probate, and the other must be filed in the office of the comptroller on or before September first next after his election."

Such bond must be filed in the manner and within the time provided by law. Section 45, Title 41, Code of Alabama 1940, established the time for the filing of such bond and that section is as follows:

"§45. Time of filing; exception.—In all cases such bonds must be filed in the proper office within forty days after the declaration of election, or after the appointment to office, except bonds of tax assessors and tax collectors which shall be filed on or before the first day of September next after their election or appointment."

The question of a vacancy in a public office created by the failure of an officer-elect to file the required bond within the required time due to his death was passed upon by the Supreme Court of Alabama in the case of *State ex rel. Foster v. Rice*, 230 Ala. 608, 162 So. 292. The facts in that case were as follows: Judge Brandon was reelected Probate Judge of Tuscaloosa County, Alabama, on November 6, 1934, and he died on December 6, 1934, without having filed the bond required. His death occurred before the expiration of the time for the filing of such bond. On December 14, 1934, Governor Miller, after receiving proof of the death of Judge Brandon, appointed Fleetwood Rice to said office. On December 19, 1934, the Circuit Clerk certified to Governor Miller that Judge Brandon had not filed the official bond required of him for the term to which he had been elected in November. Thereafter, on January 5, 1935, Governor Miller appointed Fleetwood Rice to the office and he duly accepted and qualified for said office as required by law. The question there presented was whether there was a vacancy in the new term at the time of the last appointment and, if so, what brought about the vacancy and when did it occur? In passing upon that question the court said:

"(2, 3) Under the undisputed and agreed facts, the law as to qualification for office was not complied with, for there was a failure to file a bond within the time fixed by law. True, there was no dereliction of duty, nor negligence in this regard, on the part of Judge Brandon. He died before the expiration of the time for filing his bond, and his failure in this respect was due to no fault of his own, but to all-wise Providence. But, nevertheless, there was a failure to file a bond, and the certification under section 2610 of the Code stated an obvious fact. The statute makes no reference to any cause for such failure, and, as observed in *State ex rel. Harris v. Tucker*, supra, 'failure to file *** vacates the office.'

"The language is plain, emphatic, and comprehensive. It includes all cases of 'failure to file,' and no previous judicial investigation is necessary for certification or appointment. *State ex rel. Harris v. Tucker*, supra.

"A simple illustration will suffice. If one duly elected is so stricken by disease, either in mind or body, so that the execution of a bond is impossible, and for such reason there is a failure to file a bond within the time required by law, can it be seriously questioned that upon the certification of such failure the appointive power could immediately proceed to fill the vacancy thus created? The evident purpose of the statute is to have some one ready to take the office, as it is well understood that 'the law abhors vacancies in public offices, and great precautions are

taken to avoid their occurrence.' *Prowell v. State ex rel. Hasty*, supra.

"Between the illustrated case and the present, there can be no distinction in principle. In neither instance was the elected officer at fault, yet there was a clear failure to file the bond. The statute speaks not of causes, but of effect. Though the question does not appear to have been previously here presented, yet it has been considered in other jurisdictions (see *Gibbs v. People*, 66 Colo. 414, 182 P. 894, and *People v. DeGuelle*, 47 Colo. 13, 105 P. 1110, 1113, where the holding was that a failure to qualify created a vacancy in the office, though the power to qualify 'was ended by death.' In the *DeGuelle Case*, supra, was the following observation: 'True, as said in *State v. Hopkins*, 10 Ohio St. 509, 511: 'This failure was caused by the act of God, and not by the laches of the party; but its effect upon the office is the same whatever may have been its cause. The opinion in that case concludes as follows: 'That an appointee to fill a vacancy under our law holds until the next general election, if no new term intervenes between the time of his appointment and the time of such election; but, if a new term commences during the interval, the term of the appointee ends, and the one entitled to the new term has a right thereto; but if such one on the arrival of the term does not appear and qualify, though the reason thereof be death, there is a vacancy in the office for the term. That until an appointment is made the incumbent of the previous term holds over; but when an appointment is made, and the appointee qualifies, the previous term and the rights of the incumbent to the office are ended.'

"We are persuaded, therefore, that the certification of a failure to file bond was justified under section 2610, and that by virtue of said statute a vacancy existed to be filled by the appointing power—the Governor. *State ex rel. Harris v. Tucker*, supra.

"(4, 5) Judge Brandon had been elected to the office of judge of probate in the November election, his term to begin in January, 1935. He and he alone had the inchoate right to become the actual incumbent of the office for the term beginning in January. He could have qualified prior to the date of his death. Had he duly qualified for the office, and then died, it would seem clear that a vacancy would have been created for the new term, subject to be filled by the Governor. A like result is reached upon his failure to qualify, and the certification thereof as provided by section 2610 of the Code. This vacancy occurred, therefore, during Gov. Miller's term. The statute prescribes that the vacancy be filled by the appointing power, and that power was Gov. Miller."

In the light of the law of Alabama, as above outlined, I am of the opinion, and so hold, that on September 2, 1943, there will, of necessity, be a vacancy in the office of Tax Assessor of Bibb County, Alabama, for the term beginning on October 1, 1943, caused by the failure of the Tax Assessor-elect to file an official bond as required by law within the time required by law.

The question then arises as to how that vacancy shall be filled. Is such vacancy, arising under such circumstances, filled by election or appointment?

Section 176, Title 41, Code of Alabama 1940, determines the cases in which

the Governor shall make the appointment. Said section is as follows:

"§176. Vacancies in state and county offices; how filled; term of office.—Vacancies in all state and county offices are filled by appointment of the governor, except as otherwise provided; the appointees must be commissioned, and they shall hold their offices for the unexpired term, and until their successors are elected and qualified."

It is to be noted that the Governor shall fill the vacancy except as otherwise provided. The exception there refers to Section 215, Title 17, Code of Alabama 1940, providing for special elections in certain cases. That section is as follows:

"§215. Special elections; when and for what offices held.—Special elections are to be held in the following cases:

"When a vacancy occurs in the office of senator or representative in the legislature, when the legislature will be in session prior to the next general election for that office.

"When a vacancy occurs in the office of representative in the congress of the United States, by which the state may be deprived of its full representation at any time congress will be in session prior to the next general election for that office.

"Whenever any general or special election for members of the legislature, or for representatives in congress, is not held.

"When any vacancy occurs in any state or county office filled by election of the people, not otherwise provided for by the constitution or laws of this state.

"In such other cases as are or may be provided for by law."

That section provides, among other things not here pertinent, that a special election shall be held. "When any vacancy occurs in any state or county office filled by election of the people, not otherwise provided for by the constitution or laws of this State."

I am of the opinion that the vacancy in office of Tax Assessor of Bibb County, Alabama, which will exist on September 2, 1943, as above declared, for the term beginning on October 1, 1943, is a vacancy provided for by the laws of the State of Alabama, being based upon the failure of the Tax Assessor-elect to file a bond within the time required by law, and for that reason Section 215, Title 17, Code of Alabama, 1940, providing for special elections does not apply.

I am further of the opinion that the Governor of Alabama on and after September 2, 1943, will be vested with the authority, as provided by Section 176, Title 41, Code of Alabama 1940, to fill the vacancy which will exist in the office of Tax Assessor of Bibb County, Alabama, on said date, for the term beginning on October 1, 1943, and that authority may be exercised upon the officer in whose office such bond is required to be filed, at once certifying

such failure to file said bond to the Governor of Alabama, as provided for in Section 47, Title 41, Code of Alabama 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 21, 1943.

Hon. H. P. Smith,
Tax Collector,
Coosa County,
Rockford, Alabama.

Public Officers—Holding two incompatible offices—

1. Office of Tax Collector and that of principal of a school are incompatible and the holding thereof by one person at same time is prohibited by common law as against public policy.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Your request for official opinion bearing date of January 8, 1943, is as follows:

"I am requesting an opinion of the following points:

"1. I am Tax Collector of Coosa County, and I have been requested to take the position as principal of a school for the remainder of this scholastic year. It will not interfere with my filling the duties of my office. Will it jeopardize my office for me to act in this capacity?

"2. Will the payment of my salary as school principal be legal on the part of the Superintendent and County Board of Education?"

The answer to your inquiry calls for a consideration of the law relating to the holding of two offices at one and the same time. In that connection a portion of Section 59 of 42 Am. Jur. 926, under title of Public Officers, is of importance and is as follows:

"Even in the absence of express prohibitions against the holding by one person of more than one office at the same time, there is a well-established limitation on the right to do so. This limitation operates upon offices that are in their nature incompatible, for it is a settled rule

of the common law that a public officer cannot hold two incompatible offices at the same time. The rule is founded upon the plainest principles of public policy. It is imbedded in the common law and has obtained from very early times. Its correctness and propriety are so well established as to have been assumed without discussion in many cases in which the matter of common-law incompatibility has arisen."

Likewise I further call your attention to a portion of Section 70 of 42 Am. Jur. 935, under the title of Public Officers, as follows:

"At common law, incompatible offices, as distinguished from compatible ones, cannot be held by one person at the same time, and although constitutional and statutory provisions may forbid the dual holding of offices, irrespective of their compatibility, some provisions are merely declaratory of the common-law rule. Frequently, therefore, when the right of a public officer to accept and hold another office is challenged, there is presented for determination a question whether the two offices are compatible or incompatible."

In the light of the above, I am of the opinion that the office of Tax Collector of Coosa County, Alabama, is incompatible with that of principal of a school. I am further of the opinion that you would jeopardize your office of Tax Collector of Coosa County, Alabama, by the acceptance of a position as principal of a school. In view of the above stated inhibition against the holding of two incompatible offices and its application to you as Tax Collector it will be unnecessary to answer the second portion of your inquiry.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 22, 1943.

Hon. F. L. Gaddis,
Probate Judge,
Autauga County,
Prattville, Alabama.

Autauga County—Flood Control Project—Gasoline Tax Fund—

1. County Board of Revenue can appropriate from County Gasoline Tax Fund such sums as it deems necessary and advisable to carry out the Flood Control Project in said county.

2. County may transfer funds from the General Fund to the County Gasoline and Oil Fund, or the Road and Bridge Fund, provided there is a surplus in the General Fund.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for an official opinion bearing date of January 15, 1943, is as follows:

"It develops that the Federal Flood Control Project for the protection of Prattville and vicinity from further flood disasters is costing more money than was first estimated. It is a fact that unless some additional funds are raised, this Project will be abandoned.

"In the event this Project is abandoned and not completed, the Public Roads, Highways and Bridges adjacent to the City will be jeopardized, and the County will suffer great financial loss. Our Board of Revenue is disposed to assist in this matter as a protection to the County's property, not only for the protection of its Roads and Bridges, but for the future protection of our Court House and Jail.

"We have a reserve in both the General Fund, and in the Gas Tax Fund, out of which we could make this appropriation. The question we ask you to answer for us is,—

"1st: Can we use some of our Gas Tax Fund for the payment of a portion of the work done on this Flood Control Project for the protection of our Roads and Bridges adjacent to the City of Prattville?

"2nd: Could we transfer some of our General Fund to the credit of the Road and Bridge Fund, and by that means supplement Road and Bridge Fund for the purpose of paying a portion of the Flood Control Project?

"Every public Road and Highway leading into Prattville is in danger of great damages should another flood occur; the University Highway,

and the beautiful new bridge across Autauga Creek, as well, and all other roads and bridges leading into Prattville are in danger of being greatly damaged by another flood. We are impressed that it is far better that our County spend a small amount of money on this Flood Control Project, than to sustain a much greater loss by another flood.

"It is a matter of some hurry, as the Flood Control Project depends largely on the County's ability to render this financial assistance."

I answer your first inquiry in the affirmative.

Section 647, Title 51, Code of 1940, provides in pertinent part as follows:

"The revenue, less the cost of collecting, obtained from taxes on gasoline, naphtha, and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines as is provided for in this section, **shall not be used for any purposes other than for the construction, improvement, and maintenance and supervision of highways and bridges and streets**, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes." (Emphasis Supplied.)

It will be noted from the above that one of the purposes for which the gasoline tax fund can be used is for the maintenance of highways and bridges and streets.

It is my opinion that the Flood Control Project which is being carried out in your county is designed, along with other things, to protect and maintain the highways and bridges of the county from the devastating effects of future floods. This being true, it is my opinion that the Board of Revenue of Autauga County can appropriate from its gasoline tax fund such sums as it deems necessary and advisable to carry out the Flood Control Project in said county.

In answer to your second inquiry I call attention to an opinion of this office addressed to Hon. E. W. Vance, Member, Board of Revenue, Barbour County, Eufaula, Alabama, under date of March 4, 1941, (Quarterly Reports of Attorney General, Vol. 22, page 166). If your general fund is in such a condition that you can meet the requirements laid down in this opinion, then you can transfer funds from the General Fund to the Gasoline Tax Fund or Road and Bridge Fund and, of course, such funds, after being transferred, can be used to help defray the cost of the Flood Control Project.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

January 26, 1943.

Hon. Henry Jones, Sheriff,
Jackson County,
Scottsboro, Alabama.

Cars seized for condemnation by A. B. C. Board—

Cars seized by the sheriff or turned over to the sheriff by the A. B. C. agents for condemnation and sale should be left in the hands of the sheriff's successor until final disposition is made of same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion bearing date of January 21, 1943, is as follows:

"C. F. Simmons the ex-sheriff had in his possession on the jail property 7 cars confiscated by the A. B. C. agents and turned over to him while he was sheriff. After I was sworn in and had taken possession of the jail properties, Mr. Simmons proceeded to come to the jail yard with wreckers and pull them away and has them in his possession.

"Please advise whether I am responsible for the cars or whether Mr. Simmons had the right to do this."

If the cars you refer to were in the hands of the former sheriff awaiting condemnation or were left in his hands and possession as sheriff awaiting disposition of the same by sale or otherwise, they were in the custody of C. F. Simmons, as sheriff, and not C. F. Simmons, as an individual, and when his term of office expired and his successor in office qualified, it is my opinion that these cars at once passed to the custody of his successor and should have remained in his custody as sheriff until their final disposition. It is my opinion that you are the one now responsible for the safe-keeping of same until final disposition is made.

Certainly, the ex-sheriff had no vested right in same no more than any other private citizen. He does have a vested right in all fees earned as sheriff in connection with the same but nothing else.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

January 27, 1943.

Hon. G. Claiborne Blanton,
Judge of Probate, Dallas County,
Selma, Alabama.

Tax Sale—Tax Deed—Code 1940, Title 51, Section 276—

Duplicate certificate issued by tax collector fulfills the requirements of Code 1940, Title 51, Section 276.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of January 2, 1943, is as follows:

"On March 19, 1937 in an opinion rendered by your office to the Judge of Probate of Talladega County and in another opinion rendered a short time later, the reference to which I do not have before me, your Office held that a Judge of Probate was without authority to issue a tax deed without the surrender of the certificate of purchase.

"I had a case where a person here purchased a small lot at the tax sale last year, paying the amount of \$4.22 for the property. This person is of the opinion that the Collector did not issue him a certificate of purchase. The Collector's records show that the certificate was issued. The purchaser has apparently lost the certificate. There seems to be no doubt about the fact that the purchaser is entitled to a tax deed.

"The purchaser has secured a duplicate certificate from the Collector and is willing to sign an affidavit that he is the original purchaser. Would I have authority to accept the duplicate certificate and affidavit for the issuance of tax deed?

"Also advise the court procedure necessary in the event I am without authority to issue said deed."

The opinions to which you refer in your request are as follows: Opinion to Hon. E. A. Hammett, Judge of Probate, Talladega County, dated March 19, 1937, Biennial Report of Attorney General, 1936-38, page 153; Opinion to Hon. W. C. Bragg, County Treasurer, Fayette County, rendered May 17, 1940, Quarterly Report of Attorney General, Volume XIX, page 164. I am enclosing copies of these opinions.

Code 1940, Title 51, Section 276 provides for the tax deed to be issued by the Judge of Probate after the expiration of three years from the date of the tax sale. This section is as follows:

"§ 276. Deed delivered to purchaser.—After the expiration of three

years from the date of the sale of any real estate for taxes, the judge of probate then in office must execute and deliver to the purchaser, other than the state, or person to whom the certificate of purchase has been assigned, upon the return of the certificate and payment of a fee of one dollar to the judge of probate, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed, including therein, if desired by the purchaser, any number of parcels, or lots purchased by him at such sale; and such deed shall convey to and vest in the grantee all the right, title, interest, and estate of the person whose duty it was to pay the taxes on such real estate, and the lien and claim of the state and county thereto, but it shall not convey the right, title, or interest of any reversioner or remainderman therein."

A careful reading of the opinion rendered to Hon. E. A. Hammett, Judge of Probate of Talladega County, discloses that the main consideration upon which the conclusion therein reached is the protection of the probate judge. In the opinion to Hon. W. C. Bragg, County Treasurer, Fayette County, the same theory is prevalent, but the opinion goes further and suggests that the order, in the situation there existing, may be given by the probate judge upon the purchaser's giving an indemnifying bond to the probate judge.

It is my opinion that the requirements of Title 51, Section 276, *supra*, are fulfilled by the presentation of a duplicate certificate of purchase. It is my understanding that the tax collector in issuing the certificate of purchase keeps in his office a carbon copy of the same. This carbon copy is, therefore, the original as well as the certificate that is given to the purchaser. It is to be noted that Title 51, Section 294 makes the books and records belonging to the office of the tax collector *prima facie* evidence of the facts therein stated.

The danger in accepting such a duplicate certificate is in the fact that the original certificate may have been assigned by the purchaser at the tax sale to some other person. Such an assignment is provided for by Code 1940, Title 51, Section 270. It was upon this consideration that the opinion to Hon. E. A. Hammett, *supra*, was based. At the time that opinion was rendered the statute in regard to the assignment of the certificate of purchase was provided for by Section 235, of Act No. 195, H. 324, approved July 10, 1935, General Acts 1935, page 257, (See General Revenue Act of 1935).

Upon the codification of this section into the 1940 Code as Title 51, Section 270 the following was added thereto:

"Upon such assignment it shall be the duty of the assignee or his legal representatives to assess such property as from the date of such assignment.

"Provided, however, should such assignment be made after the third Monday in January the assignee shall be allowed thirty days within which to assess such property before any penalties for such failure shall accrue."

It is my opinion that you would be adequately protected in accepting a duplicate certificate issued by the tax collector provided you secure from

the person presenting such certificate an affidavit that he has not assigned the original certificate and that he is still the owner thereof. You should also have the records in the tax assessor's office checked to see whether or not an assignee has assessed such property as is provided for in the above-quoted excerpt of Title 51, Section 270.

If you still desire to protect yourself further you could, as suggested in the opinion to Hon. W. C. Bragg, *supra*, require the applicant to give an indemnifying bond or you could, as suggested in the opinion to Hon. E. A. Hammett, *supra*, require the applicant to have his lost certificate re-established in a court of equity following the precedent outlined in *Wise v. State*, 208 Ala. 58, 93 So. 886.

Therefore, the premises considered, it is my opinion that a duplicate certificate issued by the tax collector meets the requirements of Title 51, Section 276 and that the other matter dealt with herein is merely for your protection against the original certificate having been assigned.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

January 27, 1943.

Hon. H. G. Dowling,
Commissioner of Revenue,
Capitol.

Security Tax—

1. Securities issued in exchange for or in lieu of listed securities representing the same indebtedness are not required to be listed and filed with the Department of Revenue of the State nor are they subject to the excise tax under Code 1940, Title 51, Sections 365-372.

2. Such securities are also exempt from ad valorem taxes regardless of the fact that they are not listed with the Department of Revenue.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of January 9, 1943, is as follows:

"The registration of securities with the State Department of Revenue

is provided for by Title 51, Section 366, Code of Alabama, 1940. Section 372 of this Title provides in part as follows:

“(c) The owner shall not be required to list any security or securities exchanged or issued to replace, or in lieu thereof, any securities owned and listed by the owner in the same corporation, or in a merger or consolidation of the corporation in which said securities are held.”

“(e) There shall be no ad valorem tax assessed or collected upon any security included in any list on account of which the tax prescribed by law shall have been paid, either state, county or municipal.”

“(f) In the event the securities hereinbefore mentioned are not listed and the privilege or license tax paid as herein provided, the same shall become liable for ad valorem taxes.”

“You will note that subsection (e) set out above provides that no ad valorem taxes shall be assessed or collected upon any securities ‘included in any list ***.’ However, subsection (c) set out above provides that the owner shall not be required to list any securities exchanged or issued to replace any securities owned and listed by the owner in the same corporation or in a merger or consolidation of the corporation in which said securities are held. In view of the above exemption set out in subsection (c), please advise whether or not securities which have been exchanged for other securities in the same corporation, which securities so exchanged were listed by the owner as required by law, should be registered by the owner to exempt the same from ad valorem taxes, under subsection (e) set out above.”

In order to answer your question it is necessary to examine the entire body of the law dealing with the security tax found in Code 1940, Title 51, Sections 365-372.

The undoubted purpose of this law is to raise revenue by a levy on certain written evidences of indebtedness of any foreign corporation or any foreign state or government or subdivision thereof.

It undertakes to do this by requiring a list of such evidences of indebtedness to be filed in the office of the Department of Revenue. An excise tax is levied on this listed property. Where this property is listed and the tax paid thereon, it is not subject to an ad valorem tax nor is it required to be again listed and recorded and no further excise tax is to be paid thereon. Subsection (c) of Section 372 specifically provides that evidences of indebtedness issued in exchange for or in lieu of evidences of indebtedness already listed and the excise tax paid thereon shall not be required to be listed. The new securities, in legal effect, stand in the shoes of the already listed securities. It is manifest that the intention of the law is that the new evidences of indebtedness stand for the same debt as the old securities and are not to be taxed. Moreover, the law only lays the excise tax on listed securities. The new securities are not required to be listed. Therefore, no excise tax is due thereon. Such tax has already been paid. It is evident

that the purpose of Subsection (f) of Section 372 was to prevent such evidences of indebtedness from escaping taxation by providing that if the owner failed to file a list and pay the excise tax, then such securities would be subject to an ad valorem tax.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

January 27, 1943.

Hon. J. C. Pattillo,
Ex-officio Clerk,
Inferior Law Court,
Chilton County,
Clanton, Alabama.

Courts—Circuit Court—Inferior Law Court of Chilton County,
Alabama—

1. Section 81, Title 11, Code of 1940, has no application to cases or pleas in the circuit court.

2. Local Act No. 335, 1939 Local Acts of Alabama, page 228, does not repeal in whole or part Local Act No. 144, 1923 Local Acts of Alabama, page 64, as the same is not inconsistent or in conflict therewith. As to the institution of misdemeanor prosecutions each of said acts have a separate field of operation.

3. Prosecutions for a misdemeanor may now be instituted in the Circuit Court of Chilton County, Alabama, by making affidavit before the Clerk of said court, under provisions of Local Act No. 144, 1923 Local Acts of Alabama, page 64.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Your request for official opinion, bearing date of January 16, 1943, is as follows:

“There are two questions upon which I would like to have your opinion. First; Acts 1939 page 229 which will be found in Title 2, Section 81 provides that no trial tax, Solicitor's fee or fees for entering judgment shall be taxed where the defendant enters a plea of guilt in certain courts. The State Auditors are contending that this section is not ap-

plicable to a plea in Circuit Court and it appears they are correct. I would like to have an opinion on this, however, for future guidance.

"Second; A local bill for Chilton County, 1923, abolished the County Court and authorized the commencement of prosecution in misdemeanor cases by affidavit before the clerk of the Circuit Court, local Acts 1923, page 64. In 1939 a local bill for Chilton County was passed establishing the Inferior Law Court of Chilton County. This bill will be found in Local Acts 1939, page 228. Section 11 of this Act provides that prosecution for misdemeanor may be instituted by making an affidavit before the Judge or Clerk of said court.

"The contention has been made that this latter local bill repeals the first local bill insofar as the right to commence prosecution by affidavit before the clerk of the Circuit Court. In other words it is contended that the Circuit Clerk would have no right to take an affidavit for the commencement of prosecution as provided by the local bill of 1923.

"Will you therefore, please advise me whether or not the local bill of 1923 is repealed by the local bill of 1939 in the particular requested and if so will you please advise me if the entire first local bill is repealed by the second.

"It is my contention that the second bill does not affect the first but they both have a field of operation and are not in conflict."

The section of the Code of Alabama 1940 relating to the first question propounded by you appears in said Code as Section 81 of Title 11, which section is as follows:

"§81. Fees in misdemeanor cases where defendant pleads guilty.— In all misdemeanor cases for violation of any of the provisions of titles 23 and 36 cognizable in justice of the peace courts, courts created in lieu of justice of the peace courts, county courts, inferior courts, law and equity courts, or courts of like jurisdiction, where the defendant pleads guilty and no appeal is taken, no fee shall be taxed or collected in said courts for trial, solicitor's fees, or entering judgment in such cases."

That section of the Code of Alabama 1940 has reference to the courts named therein and has no application to cases or pleas in the circuit court. Quarterly Report, Attorney General, Vol. XVII, page 386, subdivision (6).

The answer to the second question contained in your inquiry calls for a consideration of Local Act No. 144, 1923 Local Acts of Alabama, page 64, and Local Act No. 335, 1939 Local Acts of Alabama, page 228.

Local Act No. 144, supra, abolished the county court of Chilton County. Section 3 of said act provides for the institution of misdemeanor cases in the Circuit Court of Chilton County by affidavit made before the clerk of said circuit court. That section of said act is as follows:

"Section 3. That from and after the passage of this Act prosecution of persons charged with misdemeanors in Chilton County may be begun

by affidavit made before the clerk of the circuit court of Chilton County, and that thereupon the jurisdiction of the circuit court of Chilton County shall attach and the case shall proceed to trial and judgment under the same rules and procedure as provided by the law in misdemeanor cases. Nothing in this Act shall be construed as to in any manner interfere with or affect prosecutions for misdemeanors upon indictment found by the grand jury in the circuit court of Chilton County."

Local Act No. 335, *supra*, established the Inferior Law Court of Chilton County, a court of record, conferred upon it certain jurisdiction, and, among other things, provided for the institution of criminal and civil cases in said court. The provisions of that act here pertinent appear in Sections 1 and 11 of said Act. Those sections are as follows:

"Section 1. That there be and it is hereby established in the County of Chilton an Inferior Law Court which shall be called the Inferior Law Court of Chilton County and which shall be a Court of Record and shall have and exercise concurrent jurisdiction, authority, functions and powers now conferred or which may hereafter be conferred upon the several circuit courts of the State of Alabama where the amount involved, exclusive of the interest and costs, do not exceed three hundred (\$300.00) dollars, and shall have and exercise jurisdiction of all misdemeanors and all offenses arising or committed in Chilton County under Chapter 100, as amended, and Chapter 150, as amended, of the Code of 1923; provided, however, that the Inferior Law Court of Chilton County shall not have jurisdiction to try persons charged with felonies; and shall have concurrent jurisdiction with the Justices of Peace of Chilton County in all matters whatsoever."

"Section 11. Prosecutions for misdemeanors committed in Chilton County may be instituted in this Court by making an affidavit before the Judge or Clerk of said Court, writ on said affidavit to be issued by the Clerk of said Court, and when the defendant is arrested on said affidavit, said case shall go on the docket for trial and be tried as though the defendant had been indicted by a Grand Jury."

It is to be noted that neither Act No. 144, *supra*, nor Act No. 335, *supra*, abolishes jurisdiction of Justice of the Peace as to misdemeanors. Each of said acts recognizes the jurisdiction of the circuit court as to misdemeanors when properly invoked, Section 1 of Act No. 335, *supra*, specifically recognizes the concurrent features of the jurisdiction of the Inferior Law Court of Chilton County with that of the Circuit Court and justice courts.

Local Act No. 335, *supra*, does not specifically repeal Local Act No. 144, *supra*. The question then remains, is a repeal in whole or part effected by reason of conflict or inconsistency in the acts or parts thereof?

I am of the opinion, and so hold, that Local Act No. 144, *supra*, and Local Act No. 335, *supra*, in so far as they relate to the institution of misdemeanor cases, operate in separate fields. The first act declares that such cases may be instituted in the circuit court by affidavit made before the clerk of the circuit court, and the second act that such prosecutions may be instituted in the Inferior Law Court of Chilton County by making affidavit

before the Judge or Clerk thereof. The jurisdiction of the circuit court and that of the said Inferior Court remains concurrent over the subject matter, that is to say over misdemeanors. The said acts are not in conflict or inconsistent and Local Act No. 335, supra, does not repeal in part or as a whole Local Act No. 144, supra.

Under the provisions of Act No. 144, 1923 Local Acts of Alabama, page 64, a prosecution for a misdemeanor may be instituted in the Circuit Court of Chilton County, Alabama, by making affidavit before the Clerk of said court.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

January 29, 1943.

Hon. L. F. Horn, Sheriff,
Crenshaw County,
Luverne, Alabama.

Sheriffs—Attendance on County Court—

The sheriff is entitled to \$2 a day for attending the county court, whether it be a regular term or special term designated by the judge.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of January 25, 1943, is as follows:

"In Re: Sheriff's fees for attendance County Court.

"Under Title 11, Section 87, Code of 1940, the fees of the Sheriff in County Court are set out in part.

"For each day's attendance by the Sheriff, on such Court \$2.00.

"We often have cases that come up in the County Court, other than the regular day in each month for holding the County Court, where the defendant is arrested on a warrant returnable to the County Court and is confined in jail and wants a speedy trial, and is brought before the Judge of the County Court for trial, and is sometimes sentenced and often pays the fine and costs assessed by the Court.

"I would like to have your opinion, would the sheriff be entitled to the fee of \$2.00 for his attendance upon the County Court on a special day such as this? or would he be entitled under the above section only on the regular day set each month for the holding of the County Court to his fee for attendance?"

In reply to the above, it is my opinion that the sheriff is entitled to his per diem of \$2 per day for his attendance on any term of county court, whether it be a regular or a special term. In this connection, I call your attention to Title 13, Sections 322 and 325, which are as follows:

"§ 322. Monthly terms held.—A county court for the trial of misdemeanors, shall be held on the first Monday of every month, or on such other day of every month as the judge of said court may designate, at the court house thereof, and may continue until the business is disposed of. In counties where the circuit courts are held in two places, for the trial of criminal cases, the county courts shall be held at the same places at the county site on the first Monday in each month, or on such other days in each month as the judge of such court may designate, and at the other place on the second Monday in each month, or on such other days in each month as the judge of said court may designate."

"§ 325. Courts always open for trial of certain cases.—The county courts in the several counties in this state shall be open, at the discretion of the judges, any day during the week, except Sunday, for the trial of offenses coming within their jurisdiction, in all cases where the party or parties charged cannot give bond and security for their appearance at the regular terms of said courts, or desire an immediate trial; and, in such cases, causes may be continued for good cause shown under the regulations governing the continuances of causes in justices' courts; but nothing herein contained shall be so construed as to prevent or interfere with the regular terms of county courts."

Section 322, supra, you will note, has this to say:

"A county court, for the trial of misdemeanors, shall be held on the first Monday of every month, or on such other day of every month, as the judge of said court may designate, ***."

Section 325, supra, provides, among other things:

"The county courts in the several counties in this state shall be open, at the discretion of the judges, any day during the week, except Sunday, for the trial of offenses coming within their jurisdiction, in all cases where the party or parties charged cannot give bond and security for their appearance at the regular terms of said courts, or desire an immediate trial; ***."

So it is apparent from the above-quoted sections that the judge of the county court may designate any day of the week, except Sunday, as a day for holding said court and if the judge can do this and the sheriff is entitled to \$2 per day for attending on such court, it naturally follows that he

may receive this for the regular term of said court or one which has been ordered by the judge, and it is clear that he is so entitled and this office has so held. I call your attention to Title 11, Section 87, Code of 1940, which has to do with the fees in the county court and especially the following item:

"For each day's attendance by the sheriff on such court\$2.00."

Quarterly Report, Attorney General, Vol. XIII, page 119; Quarterly Report, Attorney General, Vol. III, page 92.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 1, 1943.

Hon. Norvelle R. Leigh, Jr.,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Licenses—Fees and penalties of License Inspector—Disposition of
Citation Fees and Penalties—

1. License inspector entitled to citation fees upon personal service only.
2. Penalties collected from delinquent licensees payable to inspector, though no citation served by him.
3. Penalty collected upon sale of license to delinquent payable to State treasury when office of inspector is vacant.

Opinion by Assistant Attorney General Lurie.

Dear Sir:

This will acknowledge receipt of your request for official opinion dated January 22, 1943, which is as follows:

"Between the effective date (close of business of January 16, 1943) of the resignation of Mr. Edwin A. Zelnicker as License Inspector for this County and the date (January 19, 1943) Mr. John R. Ennis, his successor, was appointed, we issued several motor vehicle and business licenses to delinquent applicants.

"In some instances citations had been issued and served by Mr. Zelnicker prior to his resignation, and in others no citations were issued. In all cases we collected the penalty of fifteen percent from delinquent applicants and where citations had been issued and served collected the usual fee of \$1.50.

"I will greatly appreciate it if you will kindly advise me, before the time expires for making my report of licenses sold for the month of January, what disposition I shall make of, and to whom I shall pay, citation fees and penalties collected under the circumstances above mentioned."

For answer to your inquiry, your attention is directed to several opinions rendered by this office in which it has been uniformly held that a citation fee is not collectible unless there has been personal service upon the delinquent. Opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of February 1, 1939, Quarterly Report, Attorney General, Vol. XV, page 86; opinion to Judge of Probate, Franklin County, Russellville, Alabama, under date of November 28, 1930, Biennial Report, Attorney General, 1930-32, page 31; opinion to Hon. G. L. Malone, Probate Judge, DeKalb County, Ft. Payne, Alabama, under date of June 9, 1931, Biennial Report, Attorney General, 1930-32, page 309. The holdings there announced are here reaffirmed and, therefore, where there is a vacancy in the office of License Inspector for Mobile County no citation could be served by such inspector and, accordingly, no such citation fee is collectible. Collection of such a fee is without authority of law and the licensee paying same should be refunded the amount so collected.

Your attention is further directed to an opinion rendered by this office to Hon. J. P. Mitchell, Judge of Probate, Henry County, Abbeville, Alabama, under date of July 2, 1940, Quarterly Report, Attorney General, Vol. XX, page 7. I herewith enclose you copy of this opinion.

Title 51, Section 835(c) and (d), Code 1940, provides as follows:

"(c) All licenses levied by this title except as otherwise provided shall be due and payable as of October first of each year and shall be delinquent November first thereafter. Where any license issuable by the probate judge or commissioner of licenses shall be delinquent, the same shall be subject to a penalty of fifteen percent of the amount of the license, which penalty must be collected by the probate judge or commissioner of licenses when the license is taken out together with interest at six percent from the date of delinquency. (d) It shall be unlawful for any probate judge or other officer to fail to collect such penalties when issuing such license."

In view of said section, supra, the probate judge in the performance of his duties must collect the penalty prescribed by law at the time of issuing the delinquent license. He cannot issue the delinquent license without so doing. This penalty is payable directly to the license inspector by the probate judge if said inspector is not on a salary basis. In the event the office of inspector is vacant, then any sums collected as penalties are payable to the State treasury inasmuch as there is no inspector to receive them.

It has been held by this office that the penalty attaches to the issuance of a delinquent license automatically and the same is payable to the license inspector, even though he issued no citation therefor. See opinion to Hon. Saxon P. Poyner, Judge of Probate, Houston County, Dothan, Alabama, under date of March 8, 1937, Biennial Report, Attorney General, 1936-38, page 126; opinion to Hon. Eugene B. Henry, License Inspector, Jefferson County, Birmingham, Alabama, under date of April 25, 1939, Quarterly Report, Attorney General, Vol. XV, page 60; **Henry v. Drennen Motor Car Co.**, 235 Ala. 559, 180 So. 563.

So long as the license inspector holds his office and up to the time he vacates same, he is entitled to receive all penalties collected from the sale of delinquent licenses unless he is on a salary basis in which event said penalties shall be remitted to the State treasury.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 2, 1943.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Justice of the Peace—Bond—Judge of Probate—

Probate Judge should approve bonds of Justice of the Peace.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of January 11, 1943, is as follows:

"Please refer to Section 388 of Title 13 and Section 80 of Title 41 and advise me in answer to the following:

"Should the Court of County Commissioners or other like governing body and the Judge of Probate of the county both approve bond of a Justice of the Peace?

"Inasmuch as there seems to be a conflict in the law as contained in the two above Titles and Sections, I should appreciate your getting me straight on this matter."

Title 13, Section 388 of the 1940 Code, reference to which is made in your inquiry, is contained in Chapter 8, of Title 13, which chapter deals exclusively with justices of the peace.

This section provides as follows:

"§388. Bond; by whom approved.—Before entering on the duties of the office, they must give bond and surety, payable and conditioned as provided by law, in the sum of one thousand dollars, which bond must be approved by the judge of probate of the county, and filed and recorded in his office."

Section 80 of Title 41 of the 1940 Code is contained in Article 3, of Chapter 2, of Title 41, which article deals with bonds of county officers. Bonds of the county officials named in Article 3 should be approved by the court of county commissioners or like governing body of the respective counties. Section 94, of Title 41, being also in Article 3 of Chapter 2 provides that the official bonds of justices of the peace, constables and county surveyors shall be in the sum of \$1,000.

An opinion of this office to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County, rendered October 30, 1940, (Quarterly Report of Attorney General, Volume XXI, page 129), held that the bonds of justices of the peace should be approved by the court of county commissioners. This opinion was based on the fact that Act No. 191, H. 344, approved April 20, 1933, General Acts 1933, page 203, (which act has been codified into the 1940 Code as Article 3, Sections 73-97, of Chapter 2, of Title 41) repealed Section 8703 of the 1923 Code (which section has been subsequently brought forward into the Code 1940 as Title 13, Section 388). It will be noted that this opinion was rendered on October 30, 1940, and that the 1940 Code did not become effective until the 31st day of May 1941.

Therefore, while the opinion to Hon. Eugene H. Hawkins, *supra*, correctly expressed the law as it existed until the 31st day of May, 1941, we have as of that day two sections of the Code (Title 13, Section 388 and Title 41, Section 80) in conflict with one another, Section 8703 of the 1923 Code being reenacted by being placed in the 1940 Code as Title 13, Section 388.

I am, therefore, presented with the question, which one of these sections control as to the approval of bonds of justices of the peace? As above stated, Section 388 of Title 13, is contained in an article dealing specifically with justices of the peace while Section 80, of Title 41, is contained in an article dealing with bonds of county officials. It is a well known rule of statutory construction that a special act on a given subject will be considered an exception to a general act, which standing alone would include the same subject and conflict with the special act. **City of Birmingham v. Southern Express Company**, 164 Ala. 529; 51 So. 159. Special provisions relating to special subjects control general provisions relating to general subjects, and things specially treated will be considered as exceptions to general provisions. **Her-ring v. Griffin**, 211 Ala. 225, 100 So. 202.

Therefore, the premises considered, it is my opinion that Section 388, of Title 13, which deals specifically with the bonds of justices of the peace must

prevail, and, therefore, such bonds should be approved by the probate judge rather than by the court of county commissioners or like governing body.

It follows from the above that it is not, in my opinion, necessary for the bond of a justice of the peace to be approved by both the probate judge and the county governing body.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 2, 1943.

Hon. H. R. Howze,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Deed Filing Tax—Code 1940, Tit. 51, § 618—Division by Tenants
in Common—Decree—

Where tenants in common, parties to a suit for partition of land held by them in common, agree to entry of a decree allotting to each of them a part or parcel of said land in severalty, a deed filing tax is due to be paid, upon the offer of said decree for record, by each such tenant based upon the value of the undivided interest in the parcel allotted to him, divested out of the other tenants and vested in him, by virtue of the decree.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of January 25, 1943, is as follows:

"I would appreciate as promptly as possible an opinion as to whether an instrument filed in my office is subject to a deed tax, inasmuch as it affects property in several other counties, and the owners of the property wish to have this document recorded in each of these counties.

"Several heirs of the same degree owned as tenants in common certain parcels of land, and after filing a bill in the Chancery Court here for a division, agreed among themselves as to the parcels each heir should receive, filed this agreement in the pending suit and the Circuit Judge rendered a decree allotting the property in conformity with this agreement.

"I take the position that, inasmuch as there was no exchange or conveyance of property, but merely a separation among the various heirs of the interest which they had held jointly, no deed tax is due the State of Alabama; but I am informed that Mr. Lapsley has told the Probate Judge of one of the counties where this decree should be recorded, that this instrument was taxable in Jefferson County where it was originally filed, and I believe it would be better to have an opinion from you."

The situation is much the same as that considered in an opinion of this office rendered March 15, 1939, to Hon. G. H. Howard, Judge of Probate, Elmore County (Quarterly Report, Attorney General, Vol. XIV, p. 182), in which it was ruled that where two tenants in common divided a tract of land by exchange of deeds each deed was subject to the deed filing tax, the measure of the tax for each deed being the value of the undivided one-half interest thereby vested in the grantee and thereby divested out of the grantor.

From your letter I understand that the parties to the suit for partition have not exchanged deeds, but desire to file for record a decree partitioning in severalty the land which they previously held as tenants in common. The decree of course operates as to each tenant in common to vest in him the undivided interests of the other tenants in common in and to that parcel allotted by the decree to the allottee, so to speak, and to that extent, for the purposes of the deed filing tax (Code 1940, Tit. 51, § 618) may be said to convey an interest in property not previously held by such tenant, and to be an "instrument of like character" to a deed.

If for the sake of illustration it be assumed that there were five tenants in common, each holding an undivided one-fifth interest in and to the land for division or partition of which suit was filed, and by the decree the land has been divided into five separate parcels, of supposedly equal value, and legal title in fee simple to each parcel is now, by virtue of the decree, vested in a different party, each party has acquired by the decree an undivided four-fifths (4/5) interest in his particular parcel in consideration of surrender by him of his undivided one-fifth interest in the other four parcels.

I am of opinion therefore that, for the filing of the decree in your office for record as a muniment of title, a deed tax is payable by each of the former tenants in common based upon the value of the undivided interests of the others which have by virtue of the decree been vested in him.

As illustrative of the same principle reference is also made to Quarterly Reports, Attorney General, Vol. XVII, p. 270, Vol. XXVII, p. 10; Vol. XIV, p. 182.

As you have not submitted a copy of the decree for examination I am unable to answer your question otherwise than in the foregoing general terms.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 4, 1943.

Hon. E. W. Stanford,
State Director,
Alabama Aviation Commission,
Montgomery, Alabama.

Title 4, Section 33, Code of Alabama 1940—Municipal Zoning—
Municipal Airports and Regulations—

Each municipality within the State may zone extra corporate territory within one quarter of a mile of an airport owned by same.

Opinion by Assistant Attorney General Lurie.

Dear Sir:

This will acknowledge receipt of your request for official opinion dated January 22, 1943, which is as follows:

"Section 33 of Title 4 of the Alabama Code of 1940 reads as follows:

"33. Zoning.—Each municipality in this state which owns any land in fee simple devoted to municipal airport uses, or upon which the development of a municipal airport has been commenced, shall have such power and authority over all extra corporate territory within one-quarter of a mile of such land as is conferred upon it with respect to territory within its corporate limits by Sections 772 and 773 of Title 37 conferring zoning powers upon municipalities having a population of one hundred thousand inhabitants, or more; provided, however, that the power and authority conferred by this section shall cease upon the abandonment of the use, or projected use, of such land for airport purposes. (Ib.)"

"We would appreciate very much your rendering us an opinion on the following questions.

"1. Does this section of the code restrict the zoning of extra corporate territory within one-quarter of a mile of an airport to cities of 100,000 inhabitants or more, or

"2. Does this section confer this right upon any incorporated municipality within the State that owns an airport?"

In order to arrive at the correct interpretation of Section 33, Title 4, Code 1940, as set out in your communication, it is necessary to direct attention to the origin of the statute.

Section 14 of Act No. 136, H. 288, (General Acts 1931, page 201) provides as follows:

"Section 14. MUNICIPAL AIRPORTS; ZONING.—Each municipality in this State which owns any land in fee simple devoted to municipal airport uses, or upon which the development of a municipal airport has been commenced, shall have such power and authority over all extra corporate territory within one-quarter of a mile of such land as is conferred upon it with respect to territory within its corporate limits by Sections 1878 and 1879 of the Code of Alabama of 1923 and/or an Act of the Legislature of Alabama approved September 26, 1923, conferring zoning powers upon municipalities having a population of one hundred thousand inhabitants, or more; provided, however, that the power and authority conferred by this section shall cease upon the abandonment of the use, or projected use, of such land for airport purposes."

Thus it may be seen that "Sections 1878 and 1879 of the Code of Alabama of 1923 and/or an Act of the Legislature of Alabama approved September 26, 1923" was deleted from said Section 14 and the corresponding sections in the 1940 Code of Alabama, Title 37, Sections 772 and 773, were inserted. In view of the change, as stated, there does not appear to be any limitation upon the authority granted but merely a change in the sections applicable thereto.

Sections 772 and 773 of Title 37, Code of 1940, provide as follows:

"§ 772. Business, industrial, or residential zones authorized.—Each municipal corporation in the State of Alabama may divide the territory within the corporate limits into business, industrial, and residential zones or districts and may provide the kind, character and use of structures and improvements that may be erected or made within the several zones or districts established and may, from time to time, rearrange or alter the boundaries of such zones or districts and may also adopt such ordinances as necessary to carry into effect and make effective the provisions of this article."

"§ 773. Advertisement of ordinance providing for zones.—No ordinance shall be passed by any municipal corporation under the authority of this article unless and until the proposed ordinance has been published for at least fifteen days in advance of its passage in a newspaper of general circulation within the municipality, or, if there is no newspaper, by posting the same in four conspicuous places within the municipality, together with a notice stating the time and place that the ordinance is to be considered by the municipal legislative authorities, and stating further that at such time and place all persons who desire shall have an opportunity of being heard in opposition to such ordinance."

Your attention is here directed to the fact that said sections, *supra*, do not contain any reference to authority conferred upon zoning commissions in municipalities of one hundred thousand inhabitants or more. Thus, we have an apparent ambiguity in Section 33, *supra*.

I feel it incumbent to trace the history of these sections in order to further their meaning. Act No. 435, S. 381 (General Acts 1923, page 581) provided for a zoning commission for cities of one hundred thousand inhabitants or more within the State. Act No. 443, S. 442 (General Acts 1923, page 590) provided the authority to every municipality in the State of Alabama

to exercise zoning powers in the plan of their respective cities. Act No. 136, H. 288, supra, provided for the zoning of each municipality in the furtherance of aerial navigation and, in order to extend this authority and power to every municipality within the State, incorporated in Section 14, supra, the authority granted in Act No. 435, S. 381, supra, and Act No. 443, S. 442, supra.

In 1935 the Legislature enacted Act No. 533, H. 991, (General Acts 1935, page 1121) which act provided for zoning and planning commissions in every municipality within the State. By this last piece of legislation each municipality was now vested with the authority to create a zoning commission and the powers and duties and method were prescribed.

These acts were brought forward in the 1940 Code in Titles 4 and 37 and it appears that the deletion heretofore mentioned should have been extended to include "conferring zoning powers upon municipalities having a population of one hundred thousand inhabitants, or more" as the inclusion of same in said Section 33, supra, is meaningless and serves no purpose in view of Articles 2 and 3 of Title 37 wherein each municipality is vested with the authority to create a zoning and planning commission.

By the language of Section 33, supra, the authority conferred upon each municipality within the State shall extend to all extra corporate territory within one-quarter of a mile of such land and such authority shall be the same as that authority vested in each municipality within the State for zoning purposes within its limits. It is my opinion that the reference in said Section 33 to "conferring zoning powers upon municipalities having a population of one hundred thousand inhabitants, or more," was meant to extend the operation of the statute and not to restrict it as it was descriptive when first used. However such extension and description is no longer necessary in view of Title 37, Articles 2 and 3 as aforesaid.

Therefore, it is apparent that Section 14, supra, confers the right of zoning of extra corporate territory within one-quarter of a mile of an airport upon any incorporated municipality owning same within the State of Alabama.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

Laseter overruled to extent that it conflicts with opinion issued to Deborah B. Crews, Butler County Revenue Commissioner, dated 11-22-2011, A. G. No. 2012-012.

February 4, 1943.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Tax Deed—Certificate of Purchase—Code 1940, Title 51, Sections 270-276—

Where the purchaser at tax sale died before expiration of the period for redemption without assigning his certificate of purchase by indorsement or otherwise in writing the judge of probate is not authorized under Code 1940, Title 51, Section 276 to execute a deed either to the decedent's heirs, legatees, or devisees, or to his personal representative.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of January 4, 1943, is as follows:

"Your attention is respectfully invited to Title 51, Sec. 276, of the Code of 1940 (reprinted in 1941 pamphlet edition page 159 of the Revenue Laws of Alabama).

"This section provides, inter alia, that where land is purchased at tax sale by a purchaser other than the State, and period for redemption has expired, the purchaser is entitled to a tax deed from the Judge of Probate, who must execute a deed to such purchaser, **'or person to whom the certificate of purchaser has been assigned,'** upon return of the certificate of purchaser, etc.

"There has been presented to me the following state of facts: A certain individual purchased land at a Tax Collector's tax sale. The purchaser died intestate before the redemption period expired. All the property and rights of property held by the deceased were inherited by his brother. Said brother in turn left a will by which he devised and bequeathed all his property and rights of property to certain legatees, one of whom presented the situation to my notice. The will was duly probated and there has never been a redemption from said tax sale.

"May I have your opinion on the question whether these legatees are entitled to a tax deed upon surrender of the Tax Collector's certificate of purchaser that was delivered to the above mentioned purchaser at the tax sale, and payment of the \$1.00 fee?"

Under date of January 20, 1943, you advise that the tax sale was on November 20, 1933, that the purchaser died in 1934 before the period for re-

demption had expired, that thereupon his widow was appointed administratrix of his estate and that there had been no final settlement.

In **Alexander v. Savage**, 90 Ala. 383, 8 So. 93, it was held that where a purchaser at tax sale died before expiration of the period for redemption a deed thereafter executed by the Judge of Probate to decedent's personal representatives was void. Said the court on page 385:

"Under this state of facts, the deed was clearly void for the want of authority in the probate judge to execute it to the administrators of the deceased purchaser. As grantor, this officer was acting under a limited statutory power. A tax deed made to one substituted for the purchaser, or to any grantee other than one sanctioned by the statute is void. The statutory authority to convey must be strictly pursued by the probate judge, and the deed made only to those to whom he is authorized by law to execute it," citing authorities.

In **Capehart v. McGahey**, 132 Ala. 334, 31 So. 503, (1902) citing **Alexander v. Savage**, supra, on page 336, it was observed:

"The certificate of purchase at tax sale *** was assigned *** by a separate writing and not by indorsement?—Code, §4067. Lusk & Bell (assignee) therefore, were not parties to whom the probate judge was authorized to execute a deed to the land, and the writing purporting to be a deed which the officer signed, etc., and delivered to them is ineffective as a conveyance of the land to them, and void."

In **Copeland v. Bond**, 155 Ala. 571, 46 So. 853, (1908) the doctrine of **Capehart v. McGahey**, supra, was approved and followed, and it was again held that failure to show affirmatively that the certificate of purchase at tax sale had been assigned "by indorsement" was fatal to the validity of a deed executed by the probate judge to an alleged owner and holder of the certificate of purchase.

The holding in **Capehart v. McGahey** and **Copeland v. Bond** led, no doubt, to amendment of the statute whereby assignment might be made not only by indorsement (Code 1886, §586, Code 1896, §4067) but also "in writing or by indorsement." Code 1907, §2289; Acts 1935, p. 358, §235; Code 1940, Title 51, §270.

After diligent search I do not find that the rule of strict construction and strict compliance in the matter of tax deeds and assignment of certificates of purchase, as announced in **Alexander v. Savage**, supra, had been modified or departed from down to date. The statute does not recognize any assignment otherwise than by indorsement or in writing. It ignores as non-existent for its purposes assignment by operation of law upon the death, bankruptcy or disability of the purchaser, so far as execution of a deed is concerned by the probate judge after the period for redemption has run. Code 1940, Title 51, §276.

As held in **Roach v. State**, 148 Ala. 419, 39 So. 685 the duty of the judge of probate is ministerial merely in the matter of executing a deed to the pur-

chaser at the tax sale or his assignee. It follows that the assignee to be entitled to a deed must be such an assignee as is contemplated by the statute; the assignment to be availing must have been made by the purchaser himself "by indorsement" of the certificate, or otherwise in writing. That is the only sort of assignment, under the rule of strict construction and strict compliance, that the probate judge is authorized to accept or recognize in performance of the purely ministerial duty imposed upon him by statute to execute the tax deed.

It follows that under the circumstances set out in your letters you are not authorized to execute a deed to the legatees therein referred to nor to the personal representative of the deceased purchaser.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 5, 1943.

Hon. Hugh D. Merrill,
Attorney for County Commission,
Calhoun County,
Anniston, Alabama.

Taxation—Exemptions—Assessment—Waiver of Right of Exemptions—Penalty—Code 1940, Title 51, Sections 41, 52; Title 37, Sections 698-732.

1. Taxpayer by failure to list and assess property claimed to be exempt on or before the third Monday in January of the current tax year waives the right to exemption, and tax assessor may thereupon assess the property as an escape and add the penalty fixed by law for assessment of escapes under Code 1940, Title 51, Section 52.

2. Penalty does not attach however to municipal taxes assessed by the county tax assessor pursuant to Code 1940, Title 37, Sections 698 et seq.

3. Neither the tax collector nor any other county official or board is authorized to remit the penalty accruing under Code 1940, Title 51, Section 52, upon assessment of property as an escape.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of January 26, 1943, is as

follows:

"At the request of the County Commission and the Tax Collector of Calhoun County, and as County Attorney for said county, I desire to make the following inquiry. The Marilyn Mills was granted exemptions from taxation by the Board of Revenue of Calhoun County, and by the City of Anniston under Title 51, Chapter 2, 1940 Code of Alabama, in June 1941, for a period of three years from October 1st, 1941. This company failed to make its tax return for 1941-1942 by January 1st, 1942, as required by law, and the Tax Assessor assessed its property as an escape after the third Monday in January 1942, and assessed a penalty of 10%. The Tax Collector is now demanding payment of taxes on all property of Marilyn Mills, including the property exempted from taxation by Calhoun County and the City of Anniston in June, 1941, and in addition thereto is demanding a penalty of 10%.

"Can the Marilyn Mills claim the exemptions allowed by the Board of Revenue of Calhoun County and the City of Anniston, or must the Tax Collector collect state, county and city taxes on all property, regardless of the exemptions, and is the Tax Collector required to collect 10% on the entire assessment, or is he or any other county official or board authorized to remit all or any portion of said penalty?"

The statute expressly provides that all property claimed exempt from taxation shall be listed with the tax assessor by the taxpayer, and entered on his return showing the items of property sought to be exempted and that no property omitted from the return shall be exempt. Code 1940, Title 51, Section 41. Accordingly, by reason of the statute, formerly appearing as Section 33 of the Revenue Act of 1935, (General Acts 1935, page 275) this office, in an opinion rendered December 4, 1935, to Honorable V. A. Spencer, Tax Assessor of Pickens County, (Quarterly Report, Vol. I, page 303) held that the taxpayer must claim his exemption by listing with the tax assessor the property claimed to be exempt on or before the third Monday in January of the current tax year; and that "an assessment must be made and signed even though the only property assessed is exempt from taxation."

The same ruling was adhered to in an opinion rendered October 5, 1939, to Honorable B. P. Singleton, Chief Examiner of Accounts (Quarterly Report, Attorney General, Vol. XVII, page 28) wherein the former opinions of this office were referred to, all to the effect that assessment must be made and the exemption claimed on or before the third Monday in January of the current tax year in order to obtain the benefit of any exemption. See also *Jones v. Johnson*, 240 Ala. 357, 199 So. 539 (1941).

Code 1940, Title 51, Section 58, expressly provides that penalties assessed against the property owner or his property for failure to return property for taxation may be remitted only by order of the Department of Revenue upon certain conditions therein stated; and Section 100 of the Constitution of 1901 forbids the extinction of any liability due the State, county or any municipality "except by payment thereof." It would seem, therefore, that neither the tax collector nor any other county official or board is authorized to remit the penalty or any part thereof which accrued upon failure of the taxpayer to list its property for taxation within the time required by law.

Code 1940, Title 51, Section 52.

However, it remains to be said that no penalty has accrued with respect to the taxes due the city of Anniston, and that the penalty is restricted to State and county taxes only. See opinion of the Attorney General, rendered October 14, 1938, to Honorable Joe Patton, Tax Collector, Sumter County, Alabama, (Quarterly Report, Attorney General, Vol. XIII, page 23).

I am of opinion, therefore, that the Marilyn Mills waived its right to claim exemptions granted by the Board of Revenue of Calhoun County and the city of Anniston for the tax year beginning October 1, 1941, by failure to make a return and claim the exemption on or before the third Monday in January, 1942, and accordingly that the tax assessor was after that date authorized to assess its property as an escape without the benefit of exemptions and to add to the amount of the assessment a penalty of 10% of taxes due the State and county, but that he is not authorized to collect any penalty with respect to taxes due the city of Anniston.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 6, 1943.

Miss Margaret O. Wilson,
Clerk Circuit Court,
Conecuh County,
Evergreen, Alabama.

Where a criminal case is sworn out before a justice of the peace and made returnable to the county court, the justice of the peace is entitled to twenty-five cents for making affidavit and fifty cents for issuing warrant.

Opinion by Assistant Attorney General Haynes.

Dear Madam:

Your request for an official opinion bearing date of January 30, 1943, is as follows:

"Please give me an opinion as to whether or not a Justice of the Peace is entitled to collect 75c for the issuing of the warrant and 75c for the issuing of the affidavit which are sworn out before him and which are returnable to the County Court. On the docket sheet of the County Court record it reads as if he were entitled to \$1.50 for the both of them in that it reads 'Affidavit and warrant each 75c.'"

My answer to your request is in the negative.

I call your attention to Title 11, Section 96, Code 1940, where it says:

"For complaint made before him25
For issuing warrant of arrest50."

The above section sets out the fees of justices of the peace in all criminal cases.

I note you say in your request, "on the docket sheet of the County Court record it reads as he were entitled to \$1.50 for the both of them in that it reads 'Affidavit and warrant each 75c.'" This should read "affidavit and warrant, 75c." Quarterly Report, Attorney General, Vol. VI, page 59. The word "each" as shown in your request is an error and, of course, you should follow the statute and not some schedule of fees prepared by some officer or committee, as the statute is the law regardless of what anyone may say to the contrary.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 9, 1943.

Hon. G. Claiborne Blanton,
Judge of Probate,
Dallas County,
Selma, Alabama.

Redemption—Tax Sale

1. Where lands are sold for 1932 taxes and bought in by the State the interest rate on the amount of money for which the land was sold, and the rate on the subsequent taxes that became due thereon prior to October 1, 1935, would be governed by Act approved September 15, 1932, General Acts of Alabama 1932, page 17, being eight per cent per annum on the money for which the land was sold and eight per cent per annum on the amount of such subsequent taxes from the maturity of such taxes to the date of redemption.

2. Act No. 194, 1935 General Acts of Alabama, page 256, deals fully and completely with the entire subject of redemption of lands sold for taxes and was clearly intended as a substitute for the Act approved September 15, 1932, 1932 General Acts of Alabama, page 17, and therefore repealed said Act.

3. Since that Act approved September 15, 1932, *supra*, was repealed on October 1, 1935, the date the 1935 taxes became due, the expression "with interest thereon at the legal rate of interest prevailing used in Subsection (a) of Act No. 526, approved September 14, 1935, General Acts of Alabama, 1935, page 1113, amending Subsection (a) of said Act No. 194, *supra*, referred to an Act approved February 9, 1935, 1935 General Acts of Alabama, page 69, now Section 60, Title 9, Code of Alabama 1940.

4. The Act approved February 9, 1935, 1935 General Acts of Alabama, page 69 and appearing as Section 60, Title 9, Code of 1940, controls the interest rate on the subsequent taxes due on October 1, 1935, and each year thereafter on redemption of property sold for taxes and such interest rate is six per cent per annum from the maturity of such taxes.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Your request for an official opinion bearing date of December 18, 1942, is as follows:

"After reading several Attorney General's Opinions concerning interest on land redemptions for sales made prior to 1935 I am unable to decide the exact rate of interest to charge for subsequent taxes.

"Please render me the following opinion as soon as possible:

"What rate of interest should I charge on property sold for 1932 taxes and purchased by the State, for the years prior to 1935 and subsequent to 1935?"

In answer to your inquiry I first call your attention to Section 3110 of the 1923 Code of Alabama as amended by an Act of the Legislature of Alabama, approved September 15, 1932, General Acts of Alabama of 1932, page 17, as follows:

"AN ACT

"To amend Section 3110 of the Code of Alabama 1923.

"Be it Enacted by the Legislature of Alabama:

"Section 1. That Section 3110 of the Code of Alabama 1923 be amended so as to read as follows: 3110. (2314) (4091) (608) MODE AND TERMS OF REDEMPTION OF LAND WHERE SOLD TO STATE.—In order to obtain the redemption of land from tax sales, where the same has been sold to the State, the party desiring to make such redemption shall deposit with the Judge of Probate of the County in which the land is situated the amount of money for which the lands were sold, with interest thereon at the rate of eight per cent per annum, from the date of sale, together with the amount of all taxes due on such lands since the date of sale, with interest thereon at the rate of eight per cent per annum from the maturity of such taxes, and all costs and fees due to officers as set out in the following section. Provided, however, that where the person in whose name such land was assessed at the time of such sale, or some other person having ownership or interest therein, has regularly assessed such land for taxation for the assessment years subsequent to the year for the taxes of which the land was sold and the taxes due thereon have been fully paid, and on certificates of the Tax Assessor and Tax Collector to that effect, the person redeeming such land shall be relieved of paying to the Probate Judge the taxes of such subsequent years, and, Provided further, that said lands shall in any event be subject to assessment for taxes for the current assessment year in which redeemed, and if not regularly assessed on or before February 1st in the name of the person redeeming the same, or by any other person interested therein, the Probate Judge shall give notice of such redemption to the Tax Assessor, who shall forthwith list such land for assessment in the name of the person redeeming the same at the same valuation of assessment under which it was sold, shall enter the same on his records of assessment and Collector's abstract of assessments and shall furnish to the State Auditor an abstract of such supplemental assessment, and the taxes thereon shall be due and collectible as other taxes.

"Approved September 15, 1932."

You will notice that under the terms and provisions of that Act the amount of money for which the land was sold and the amount of all taxes due on such land since the date of sale bears interest at the rate of eight per cent per annum.

The law with reference to tax redemption received further action by the legislature in 1935, Subsection (a) of Section 269 of Act No. 194, General Acts of Alabama 1935, page 256, provides:

"(a) In order to obtain the redemption of land from tax sales, where the same has been sold to the State, the party desiring to make such redemption shall deposit with the judge of probate of the county in which the land is situated the amount of money for which the lands were sold, with interest thereon at the rate of six per cent per annum from the date of sale, together with the amount of all taxes found to be due on such lands since the date of sale; as provided herein, with interest thereon at the rate of six per cent per annum from the maturity of such taxes, and all costs and fees due to officers as set out in the following sections."

And Section 407 of said Act No. 194, *supra*, provides:

"Except as otherwise provided in this Act, all the provisions of this Act shall go into effect the first day of October, 1935."

Therefore, the interest rate with reference to lands bought in by the State at tax sales, provided by 1932 Act, *supra*, prevailed until October 1, 1935, as no other Act intervened prior to that date.

The premises considered it is my opinion, and I so hold that where lands were sold for 1932 taxes, which sale evidently occurred during the year 1933, and bought in by the State, the interest rate on the amount of money for which the land was sold and the interest rate on the subsequent taxes that became due thereon prior to October 1935, would be governed by the Act approved September 15, 1932, General Acts of Alabama 1932, page 17, *supra*. The interest rate on the money for which the land was sold would be eight per cent per annum from the date of the sale to the date of redemption. The interest rate on the subsequent taxes due on October 1, 1933, and October 1, 1934, would be eight per cent per annum from the maturity of such taxes to the date of redemption.

I now come to a consideration of the interest rate on the subsequent taxes due on October 1, 1935. In that connection I refer you to Subsection (a) of Section 269 of Act No. 194, General Acts of Alabama 1935, page 256, *supra*, which, as originally enacted, established a rate of six per cent per annum on the amount of money for which the land was sold and the subsequent taxes found to be due. That section of the law became effective on October 1, 1935, the date the 1935 taxes became due. But prior to the effective date of that Act Subsection (a) of Section 269 thereof was amended by Subsection (a) of Act No. 526, approved September 14, 1935, General Acts of Alabama 1935, page 1113, which subsection is as follows:

"(a) In order to obtain the redemption of land from tax sales, where the same has been heretofore or hereafter sold to the State, the party desiring to make such redemption shall deposit with the judge of probate of the county in which the land is situated, the amount of money for which the lands were sold, with interest thereon at the legal rate of interest prevailing at the time said property was sold for taxes, together with the

amount of all taxes found to be due on such land since the date of sale, as provided herein, with interest thereon at the legal rate of interest prevailing from the maturity of such taxes, and all costs and fees due to officers as set out in the following sections:"

Therefore, when Act No. 194, supra, became effective on October 1, 1935, it had been amended to read as Subsection (a) of Act No. 526, supra, in which the provisions for six per cent interest had been omitted, and in lieu thereof the expression, "with interest thereon at the legal rate of interest prevailing from the maturity of such taxes."

The question then arises as to what was the legal rate of interest prevailing for subsequent taxes that became due on October 1, 1935, and on October 1 of each year thereafter? The answer to that question depends upon the question of whether Act No. 194, supra, taken in connection with Act No. 526, supra, repealed Section 3110 of the Code of 1923 as amended by an Act approved September 15, 1932, General Acts of Alabama 1932, page 17, supra, with reference to the rate of interest provided by said Act last mentioned? I am of the opinion, and so hold that it did.

House Bill 324, Act No. 194, entitled An Act To Provide For The General Revenue of The State of Alabama, 1935. General Acts of Alabama, Page 256, covers several hundred pages, and embraces many fields of taxation. Article VIII, Chapter 5, of said Act is entitled "REDEMPTION OF LANDS SOLD FOR TAXES," and that Chapter deals fully and completely with the entire subject described in its title. The amendment of subsection (a) of Section 269 of said Act, a part of Chapter 5 of Article VIII thereof, by subsection (a) of Act No. 526, supra, before the effective date of said Act No. 194, did not limit the scope of it in dealing with the entire subject of redemption of lands sold for taxes.

In the case of *Bradford v. Carson*, 223 Ala. 594, 137 So. 426, appears the following rule of statutory construction:

"The rule has been many times expressed that 'where the provisions of a subsequent statute cover the entire subject-matter of a former statute, and are clearly intended as a complete substitute for all the provisions of the former, a repeal of the former statute is had.'"

A further discussion of the law applicable to such a repeal of a statute is found in the case of *American Standard Life Ins. Co. v. State*, 226 Ala. 383, 147 So. 168, wherein the court said:

"Though 'an act seeking to deal fully and completely with the entire subject of a former statute takes the place of and repeals the provisions of the former.' *Levy, Aronson & White v. Jones*, 208 Ala. 104, 93 So. 733, 736, and cases there cited; 39 Corpus Juris, 919.

"The repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed not as an implied repeal of the original statute, but as (an affirmance and) a continuance thereof.' *Tucker v. McLendon*, 210 Ala. 562, 98 So. 797, 799; *Allgood*

v. S.-S. S. & I. Co. 196 Ala. 500, 71 So. 724, 59 Corpus Juris, 927.

"But, if parts of the original act are omitted from that which is a complete revision of the law on the subject, such omitted parts are annulled and repealed. *Allgood v. S.-S. S. & I. Co.*, supra; 59 Corpus Juris, 922, § 522."

I am of the opinion, in the light of the above, and so hold, that Act No. 194, 1935 General Acts of Alabama, Page 256, deals fully and completely with the entire subject of redemption of lands sold for taxes and was clearly intended as a substitute for the Act approved September 15, 1932, 1932 General Acts of Alabama, page 17, and therefore repealed said Act.

In that connection it is significant that the Act approved September 15, 1932, supra, was not carried forward into the 1940 Code of Alabama.

I am further of the opinion that since the Act approved September 15, 1932, supra, was repealed on October 1, 1935, the date the 1935 taxes became due, the expression "with interest thereon at the legal rate of interest prevailing" used in subsection (a) of Act No. 526, approved September 14, 1935, General Acts of Alabama 1935, page 1113, amending subsection (a) of Section 269 of Act No. 194, supra, referred to an Act approved February 9, 1935, 1935 General Acts of Alabama, page 69, now Section 60, Title 9, Code of Alabama 1940. That Section is as follows:

"§ 60. Rates of interest fixed at six and eight percent.—The rate of interest upon the loan or forbearance of money, goods or things in action, except by written contract, is six dollars upon one hundred dollars for one year, and the rate of interest by written contract is not to exceed eight dollars upon one hundred dollars for one year; and at that rate for a greater or less sum, or for a longer or shorter time."

Section No. 269 of Act No. 194, supra, was again amended by an Act approved March 26, 1936, General Acts of Alabama 1936, Page 30, but without effecting the same so far as the question before us is concerned. And the law with reference to the rate of interest to be charged on redemption of land sold to the state for taxes now appears as subsection (a) of Section 304, Title 51, Code of Alabama 1940 and is as follows:

"(a) In order to obtain the redemption of land from tax sales, where the same has been heretofore or hereafter sold to the state, the party desiring to make such redemption shall deposit with the judge of probate of the county in which the land is situated, the amount of money for which the lands were sold, with interest thereon at the legal rate of interest prevailing at the time said property was sold for taxes, together with the amount of all taxes found to be due on such land since the date of sale, as provided herein, with interest thereon at the legal rate of interest prevailing from the maturity of such taxes, and all costs and fees due to officers."

I am of the opinion that the Act approved February 9, 1935, 1935 General Acts of Alabama, page 69, and appearing as Section 60, Title 9, Code of 1940,

controls the interest rate on the subsequent taxes due on October 1, 1935, and each year thereafter on redemption of property sold for taxes and that such interest rate is six per cent per annum from the maturity of such taxes.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 11, 1943.

Hon. H. L. Cottle, Acting Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Alcoholic Beverage Control Board—Rules and Regulations
Pertaining to Sale of Malt and Brewed Beverages—

The Alabama Alcoholic Beverage Control Board has authority to alter, modify, revoke, amend or continue rules and regulations governing the sale of malt or brewed beverages.

Licenses to sell malt or brewed beverages who secured licenses prior to the alteration, modification, or amendment of the rules and regulations governing the sale of such beverages are subject to and must conform with the said altered, modified, or amended rules and regulations.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for my official opinion bearing date of February 3, 1943, is as follows:

"1942 malt or brewed beverage licenses expired December 31, 1942 and became delinquent January 20, 1943. Applicants for renewal, when approved, were issued malt or brewed beverage licenses during the first part of January and such licenses were mailed to the licensees and sales have been made under them.

"1943 liquor licenses were not issued until a new Board could be selected and new Rules and Regulations formulated.

"The new Board has now fixed such Rules and Regulations and have begun the issuance of retail liquor licenses subject to the provisions of certain Rules and Regulations. The Board is now desirous of making

these Rules and Regulations retroactive and to be in force on the malt or brewed beverage licenses issued prior to January 20, 1943.

"The Board wishes to know if it has the power to make these Rules and Regulations effective on the malt or brewed beverage licenses which were issued before such Rules and Regulations were formulated."

When the 1943 malt or brewed beverage licenses were issued during the first part of January 1943, the sale of such beverages was subject to certain rules and regulations of the A. B. C. Board, which had been adopted prior to the appointment of the new and present A. B. C. Board. The real question presented by your inquiry is whether or not the rules and regulations in effect at the time of the issuance of malt and brewed beverage licenses during the first part of January 1943 can be altered, modified or amended and such licenses made subject to such altered, modified or amended rules and regulations, rather than the retroactive effect of new Rules and Regulations adopted by the Board governing the sale of such beverages. Or to state the question in another way: Do the licensees who secured licenses on or prior to January 20, 1943, have a vested right to sell such beverages under the rules and regulations then in effect, or can such sales be made subject to new rules and regulations adopted by the Board for the retail sale of intoxicants?

The answer to the above question turns upon the legal definition of a license and the rights and privileges conferred thereunder.

"A license is merely a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority, federal, state or municipal, granting it and the person to whom it is granted; neither is it property or a property right, nor does it create a vested right, nor is it taxation. It has been held, however, that a license tax involves a contract obligation to pay the specific compensation for the privilege." 37 C. J. p. 168, Sec. 4.

A license is a mere privilege to carry on a business subject to the will of the grantor. **Johnson v. Liquor Control Commission**, 266 Mich. 682, 254 N. W. 557.

A license to retail intoxicating liquor is neither a property right nor a contract. It is in no sense a contract made by the state with the party holding the license; it is a mere permit, subject to be modified or annulled at the will and pleasure of the granting power. **Ex parte Deats**, 22 N. W. 536, 166 P. 913.

Black on Intoxicating Liquors says:

"A license is essentially the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not enjoyed by a class of citizens to which the licensee belongs. A common right is not the creature of a license law. In a general sense a license is permission granted by some competent authority to do an act which without such permission would be illegal. The popular understanding of the word 'license' is undoubtedly a permission to do something which without the

license would not be allowable. This is also the legal meaning. The object of a license is to confer a right which does not exist without a license. A license is a privilege granted by the state, usually on payment of a valuable consideration, though this is not essential. To constitute a privilege, the grant must confer authority to do something which without the grant would be illegal, for, if what is to be done under the license is open to everyone without it, the grant would be merely idle and nugatory, conferring no privilege whatever. But the thing to be done may be lawful within itself, and only prohibited for the purposes of the license; that is to say, prohibited in order to compel the taking out of a license. From these definitions, which are the best to be found in the books, it will be apparent that three leading ideas are involved in the definition of a 'license' under the liquor laws: First, it confers a special privilege or franchise upon selected persons to pursue a calling not open to all; second, it legalizes acts which, if done without its protection, would be offenses against the statute; third, it is a privilege granted as a part of a system of police regulations, and herein, is distinguished from 'taxation'. Section 117.

Hubmon v. State, 61 Ark. 482, 33 S. W. 843;

Silver v. City of Sparta, 107 Ga. 275, 33 S. E. 31.

A "license" is in no sense a contract between the state and the licensee, and is not protected by the contract clause of the Federal or State Constitutions, but is a mere personal permit, neither transferrable or vendible.

Foshee v. State, 15 Ala. App. 113, 72 So. 685, cert. denied 198 Ala. 689, 73 So. 999;

Jones v. Motley, 78 Ala. 370;

Powell v. State, 69 Ala. 10.

The status and rights of one seeking a license to engage in the sale of intoxicants, and the status and rights of one already so engaged, has been the subject of discussion by the Supreme Court of Alabama in the case of **State ex rel Crumpton v. Montgomery et al.**, Excise Commission, 59 So. 294, 301, wherein the court said:

"It is universally recognized that the act of engaging in the sale of intoxicants may be wholly forbidden, and that a license to engage in the traffic in liquors is a privilege merely revocable at the will of the superior granting power; that there is in it no element of property right or vested interest of any kind."

See also opinion of the Attorney General to Hon. W. L. DeVan, Administrator, A. B. C. Board, Montgomery, Alabama, dated November 23, 1942, wherein it is further stated:

"It is also a well settled principal of law that one who seeks the benefit of a granted privilege must comply with all the conditions attached

in order to acquire the privilege.”

To sum up: Licenses to sell intoxicants are not contracts between the granting authority and the persons licensed, giving the latter vested rights, protected on general principles and by the Federal and State Constitutions against subsequent legislation, nor are such licenses property in any legal or constitutional sense. Such licenses have neither the qualities of a contract nor of property, but are merely temporary permits to do what otherwise would be an offense against the law. Such licenses form a portion of the internal police system of the State, are issued in the exercise of police powers of the State, and are subject to the direction of the State government through the medium of a duly and legally constituted board, which may modify, revoke, alter or continue them, as it may deem fit. Such licenses are permits to the licensees to engage in the business of selling intoxicants under such restrictions, conditions and limitations as may appear judicious to the authority issuing them.

The authority of the A. B. C. Board to make regulations is found in Title 29, Sec. 6, Code 1940, which reads as follows:

“§6. Regulations of board; evidence.—The board may from time to time make such regulations not inconsistent with this chapter as it shall deem necessary for carrying out the provisions of this chapter, and from time to time alter, repeal or amend such regulations, or any of them.

“Prima facie evidence of any such regulation may be given in all courts and proceedings by the production of what purports to be an official printed copy of such regulation, alteration, repeal or amendment. (Ib)”

The premises considered, it is my opinion that the A. B. C. Board may alter, modify, revoke, amend or continue the rules and regulations governing the sale of malt or brewed beverages which were in effect at the time the 1943 malt or brewed beverage licenses were issued. It is my further opinion that the privileges accorded malt or brewed beverage licensees under the rules and regulations in effect at the time said licenses were issued are not such vested contract, or property rights of the licensees as would preclude the A. B. C. Board from passing rules and regulations altering, modifying, amending, restricting, or otherwise changing the privileges which were conferred at the time the licenses were issued.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 11, 1943.

*See opinion
issued to Walter
Owens on 1-25-47*

Hon. M. C. Hayes,
Tax Collector,
Chilton County,
Clanton, Alabama.

Public Officer—Clerks and Deputies—

1. The clerk or deputy of tax collector was his agent and his authority as such ceased upon the death of the tax collector.
2. Demands on delinquent taxpayers made by clerk or deputy of tax collector subsequent to his death do not meet the requirements of § 194, Title 51, Code of 1940, and in such case no one is authorized to collect the fee provided by § 193, Title 51, Code of 1940, based upon such demands.

Opinion by The Attorney General.

Dear Sir:

Your request for official opinion bearing date of January 28, 1943, is as follows:

"Mr. T. M. Taylor, the Tax Collector of Chilton County, Alabama, died early Friday morning, the 8th of January, 1943.

"The writer was appointed, qualified and assumed the duties of office on Friday, January 15th, 1943. The clerk employed by Mr. Taylor in his office, commencing on or about January 9th, and definitely after Mr. Taylor's death, prepared and mailed the demands in writing on the delinquent taxpayers, as provided in Sections 193 to 195, inclusive, of Title 51, of the Code of 1940 of Alabama.

"You will please advise me as follows: Whether or not the demands made by Mr. Taylor's clerk, subsequent to his death, would meet the requirements of a legal demand under Section 194. Second, also advise me whether or not I would be authorized to collect the fee of fifty cents for making this demand on each delinquent taxpayer, based on the notice mailed the taxpayer, by the clerk, after Mr. Taylor's death. Third, in the event it should be determined that the demand made by Mr. Taylor was not legal, should he proceed at once and mail the taxpayers the demand contemplated by the sections mentioned.

"Please also advise me who would be entitled to the fees for making the demands in each of the instances detailed above upon the delinquent taxpayers."

The questions contained in your inquiry do not appear to have been answered by any prior opinion of this office, nor have I been able to find a de-

cision of the courts of last resort of the State of Alabama that answers the same.

In answer to the first question contained in your inquiry, to wit: "Whether or not the demands made by Mr. Taylor's clerk, subsequent to his death, would meet the requirements of a legal demand under Section 194," calls for a consideration of that section which appears as § 194, Title 51, Code of 1940, which is as follows:

"§ 194. Demand on delinquent taxpayers.—After the first day of January the collector must make a personal demand in writing upon delinquent taxpayers, or their agents charged with the duty of paying their taxes, whenever they may be found, for the amount of their taxes and fees, and when unable to find them, to make a demand by registered mail directed to his last known place of residence or business, return card demanded. It shall be the duty of such delinquents forthwith to pay the taxes and fees assessed and charged against them. But failure to comply with the requirements of this section shall not invalidate the title to any property sold for taxes."

It is to be noted that section provides, "the collector must make a personal demand in writing upon delinquent taxpayers."

Section 190, Title 51, Code of 1940, is also pertinent in this connection and it is as follows:

"§ 190. Deputies.—The tax collector is authorized to appoint deputies, and the acts of such deputies shall be recognized as his acts, and he shall be responsible for any loss sustained by any taxpayer, or by the state or county, by reason of the acts done by such deputies in the line of their powers and duties. Such deputies shall receive no compensation for their services out of the state or county revenue, except as otherwise provided by law."

The deputies provided by that section are appointed by the tax collector, paid by him in your county, and have no fixed term, and in my opinion, serve at his pleasure.

In 43 Am. Jur. 218, under the title of Public Officers and under subhead or title "Deputies and Assistants" appears § 460 which is as follows:

"§ 460. Generally; Definitions and Distinctions.—Among the principal aides to public officers are duties and assistants. The two are by no means the same or equivalent, and the two words are not legally synonymous. An assistant is one who aids, helps, or assists, while a deputy is a person appointed to act for another, a substitute or delegate who acts officially for his principal. Another distinction sometimes pointed out is that an assistant may or may not be sworn, while 'deputy' implies only the sworn class. The former is the more comprehensive of the two words and includes the latter within its reach, but the person described thereby is usually more clerical than otherwise, while the latter may do anything that his principal may do. And while ministerial acts may be del-

egated by an officer or board to 'assistants' whose employment is authorized, they do not have the status of deputies to whom quasi-judicial functions may be delegated. A deputy is a person appointed as the substitute of another and empowered to act for him in his name and behalf in all matters in which the principal may act. His principal is responsible for his acts, he is removable at the pleasure of his principal, and his authority ceases at the latter's death or disqualification. Legislative authorization for the appointment of a 'deputy' does not create or authorize the appointment of an 'assistant.'"

That section declares, "His principal is responsible for his acts, he is removable at the pleasure of his principal, and his authority ceases at the latter's death or disqualification."

In the note to *Naill v. State*, Ann. Cas. 1912A, 1268, which note is found on page 1271 is the following:

"A deputy is a person appointed as the substitute of another and empowered to act for him in his name and behalf in all matters in which the principal may act. His principal is responsible for his acts, he is removable at the pleasure of the principal, and his authority ceases upon the death or disqualification of his principal.

"England.—*Shrewsburie's Cases*, 9 Coke 42; *Norton v. Simmes*, Hob. 12; *Parker v. Kett*, 1 Ld. Raym. 658, 1 Salk. 95, 12 Mod. 467.

"United States.—*The Confiscation Cases*, 20 Wall, 92, 22 U. S. (L. ed.) 322; *Erwin v. U. S.* 37 Fed. 475, 2 L. R. A. 229.

"Dakota.—*Wilson v. Russell*, 4 Dak. 376, 31 N. W. 645.

"Florida.—*Willingham v. State*, 21 Fla. 761.

"Iowa.—*Abrams v. Ervin*, 9 Ia. 87.

"Kentucky.—*Ellison v. Stevenson*, 6 T. B. Mon. 271.

"Missouri.—*Carter v. Hornback*, 139 Mo. 238, 40 S. W. 893, *Halter v. Leonard*, 223 Mo. 286, 122 S. W. 706.

"New York.—*Matter of Tilyou*, 57 App. Div. 101, 67 N. Y. S. 1097; *People v. Barker*, 14 Misc. 360, 35 N. Y. S. 727.

"North Carolina.—*Willis v. Melvin*, 53 N. C. 62; *Piland v. Taylor*, 113 N. C. 1, 18 S. E. 70; *White v. Hill*, 125 N. C. 200, 34 S. E. 432.

"Pennsylvania.—*Appointment of Deputy Secretary of Internal Affairs*, 29 Pa. Co. Ct. 219.

"Utah.—*Steinke v. Graves*, 16 Utah 293, 52 Pac. 386.

"West Virginia.—Herring v. Lee, 22 W. Va. 664; Rowan v. Chenoweth, 49 W. Va. 291, 38 S. E. 544, 87 Am. St. Rep. 796.

"Wisconsin.—Butler v. Milwaukee, 119 Wis. 526, 97 N. W. 185.

See also 46 C. J. 1062, § 381, which declares among other things, that, "The authority given by law to a ministerial officer is given to the incumbent of the office, and a deputy is ordinarily regarded as the agent or servant of his principal." It is elementary that authority of the agent ceases on the death of the principal.

In the light of the above I am of the opinion that the clerk or deputy of Mr. Taylor, as Tax Collector of Chilton County, Alabama, was his agent and that his authority as such ceased upon the death of Mr. Taylor. All acts performed by him subsequent to the death of Mr. Taylor were without authority and do not meet the requirements of the demand on delinquent taxpayers called for by § 194, Title 51, Code of 1940. Since the demands on the delinquent taxpayers mailed by the clerk or deputy of Mr. Taylor after his death do not meet the requirements of law no one is authorized to collect the fee provided by § 193, Title 51, Code of 1940, based upon such demands.

I am further of the opinion that in view of the fact that since such demands have not been legally made it is your duty, as Tax Collector of Chilton County, Alabama, to now proceed to make a personal demand in writing upon the delinquent taxpayers as provided by § 194, Title 51, Code of 1940, for which you, as such tax collector will be entitled to receive the fee provided by § 193, Title 51, Code of 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 12, 1943.

Hon. W. C. Harrison,
Associate Commissioner,
Alabama Public Service Commission,
Montgomery, Alabama.

Contract Carrier, Exemption—

1. Section 301(2) exempts "motor vehicles if engaged in hauling livestock for a distance not exceeding seventy-five miles" from complying with the provision of law relating to certificates of convenience and necessity or permit to operate as a contract carrier.

2. A carrier coming within the above exemption is not required to select a particular route or routes not exceeding seventy-five miles, but may transport livestock for such distance over any route within the State on any one trip or load.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Your request for official opinion, bearing date of January 23, 1943, is as follows:

"Section 301 (2) Title 48, of the Code of Alabama 1940, reads in part as follows:

"This Article shall not be construed to apply to: A. *** (3) Motor vehicles while used in the intrastate transportation of property when the person furnishing the transportation is legally and regularly engaged in the business of selling such property; also motor vehicles if engaged in hauling milk, livestock, coal, logs, lumber, poles, pulpwood, cotton in bales or cotton seed, for a distance not exceeding seventy-five miles, or fertilizer when being hauled directly to a farm, for a distance not exceeding one hundred fifty miles; or trucks hauling road materials and paid by the State of Alabama, for a distance not exceeding twenty-five miles, and motor vehicles used exclusively in the transportation of milk in thermal or artificially cooled bodies or containers for a distance not exceeding one hundred fifty miles; except that this subsection shall not be construed to exempt from the provisions of this article any motor carrier who operates under a certificate or permit granted under the authority of the Alabama Public Service Commission. All motor vehicles hauling property for hire and exempt under subsection A(3) of Section 301(2) of this title must before transporting such property secure a permit from the department of revenue of the State of Alabama, which permit shall be furnished without cost upon proper application. Such permit shall be issued under reasonable rules and regulations promulgated by the department of revenue of the State of Alabama."

"What we would like to know is (1) Would a carrier who is not operating under a certificate or permit issued by the Alabama Public Service Commission, and who transports by motor vehicle livestock within a radius not exceeding 75 miles of a certain point, be required to apply to this Commission for a certificate of convenience and necessity, or a permit to operate as a contract carrier of livestock, or (2) would such a carrier be required to select a particular route or routes not exceeding 75 miles?"

Your inquiry calls for a consideration, first, of § 301(2), Title 48, Code of 1940, (Pocket Part) which provides, among other things, as follows:

"§ 301(2). Application of article.—This article shall not be construed to apply to: A. *** (3) Motor vehicles while used in the intrastate transportation of property when the person furnishing the transportation is legally and regularly engaged in the business of selling such property; also motor vehicles if engaged in hauling milk, livestock, coal, logs, lumber, poles, pulpwood, cotton in bales or cotton seed for a distance not exceeding seventy-five miles, *** ; except that this subsection shall not be construed to exempt from the provisions of this article any motor carrier who operates under a certificate or permit granted under the authority of the Alabama public service commission. All motor vehicles hauling property for hire and exempt under subsection A(3) of section 301(2) of this title must before transporting such property secure a permit from the department of revenue of the State of Alabama, which permit shall be furnished without cost upon proper application."

The above quoted provision of said statute definitely exempts "motor vehicles if engaged in hauling livestock for a distance not exceeding seventy-five miles" from complying with the other provisions of Article 3, Title 48, Code of 1940, relating to certificate of convenience and necessity, or permits to operate as a contract carrier.

The expression, "a radius not exceeding 75 miles of a certain point," used in your inquiry is capable of a construction which would not fall within the exemption. The diameter of a circle with a seventy-five mile radius is one hundred fifty miles. A person may transport livestock within a radius of seventy-five miles of a certain point and yet travel a distance of one hundred fifty miles or more and in so doing place himself outside the exemption.

The exemption is not based upon a seventy-five mile radius but upon "a distance not exceeding seventy-five miles." The exemption will apply so long as the livestock are transported by motor vehicle for a distance not exceeding seventy-five miles at any one trip or load and over any route in the state.

I am further of the opinion a carrier coming within the above stated exemption is not required to select a particular route or routes not exceeding seventy-five miles.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 19, 1943

Hon. Hugh L. Cottle,
Acting Administrator,
Alabama Alcoholic Beverage Control Board,
Capitol.

Alabama Alcoholic Beverage Control Board—Advertising by license of malt or brewed beverages—

Offering of prizes by licensee of malt or brewed beverages in a radio broadcasting advertisement to contestants competing for such prizes who are not required, as a condition to enter said contest, to purchase any product of the advertising company is not illegal within the meaning of the Alabama Alcoholic Beverage Control Act.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion bearing date of February 8, 1943, is as follows:

"This Board has received a request from radio station WSFA relative to the use of an advertising broadcast for Montgomery Beverage Company, sponsors of "Chevy Ale," in connection with two feature contests. The announcement which is to be used will be similar to the following, which has been furnished to us by the radio station:

"The Montgomery Beverage Company, distributors of Chevy Ale and sponsors of the Chevy Ale Evening News for over six years announce TWO separate and distinct feature contests, in which they will give away \$3,500 in War Bonds. All you have to do to enter is **mail** to the Chevy Ale Evening News this station a card or letter stating in your opinion the year, day, hour and minute hostilities with Germany will cease; and on another card or in another letter the same information about our war with Japan. You may enter **One** or **both** contests—but answers to each contest must be on a separate card or letter and mailed to Chevy Ale Evening News, WSFA. Answers to both contests on one card or letter will disqualify both answers. Answers brought in **WILL NOT BE** accepted. Any person 18 years old or older is eligible, provided they are citizens of the USA.

"The first prize of \$1,000 War Bonds will be awarded the person whose answer is nearest correct; a 2nd prize of \$500.00 War Bond to the person whose answer is 2nd. nearest correct and a 3rd prize to the person whose answer is 3rd nearest correct in **EACH** contest. In other words, the Montgomery Beverage Company will award \$1,750.00 in War Bonds in each contest. No person may send in more than one answer in one calendar month. Answers received during the 30 day period immediately preceding actual cessation of hostilities in each war will not be counted. The sponsor may limit the

time answers may be received.

“Get your answers in right away—because in case of ties the answer **post marked** the earliest will be declared the winner. Mail your answers to the Chevy Ale Evening News care WSFA—and do it now.”

“It will be greatly appreciated if you will render an official opinion as to whether or not this Board is authorized to grant approval for the use of such a broadcasting program under the present provisions of those Sections of Title 29 of the Code of Alabama 1940, as regards the sale and handling of alcoholic beverages in this State.”

Title 29, Section 12, Code of 1940, reads as follows:

“§12. Advertising.—There shall be no electric signs, painted signs, or signs of any kind, displayed outside any place of business advertising alcoholic beverages as enumerated and defined in this chapter; **and there shall be no advertising of alcoholic beverages as enumerated and defined in this chapter, except through newspapers, magazines and radio broadcasting stations, provided, however, that malt or brewed beverages as herein defined may be advertised by means of billboards.**” (Emphasis supplied)

From the emphasized portion of the above section it will be seen that advertising through the medium of radio broadcasting stations is a legal mode of advertising beer and malt beverages.

Title 29, Section 37, Code of 1940 is as follows:

“§37. Illegal premiums.—It shall be unlawful for any person licensed to sell malt or brewed beverages to offer or give anything of value as a premium for the return of caps, stoppers, corks, stamps, or labels taken from any bottle, case, barrel or package containing such malt or brewed beverages, or to offer to give anything of value as a premium or present to induce the purchase of such malt or brewed beverages or for any other purpose whatsoever in connection with the sale of such malt or brewed beverages. This section shall not apply to the return of any moneys specifically deposited for the return of the original containers to the owners thereof.”

The advertising of malt or brewed beverages through the means of radio broadcasting being a legal mode of advertising such beverages, Title 29, Section 12, *supra*, the question is whether or not the offering of prizes, as set out in your request, makes such an advertisement illegal within the meaning of Title 29, Section 37, *supra*.

The Supreme Court of the United States in the case of *Rast v. Van Deman and Lewis Company*, 60 L. ed. 679, 16 L. R. A. 1917A, 421, defined advertising and its purpose in the following language: “Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisi-

tion of the article to be sold constitutes the only inducement to its purchase. The matter is simple, single in purpose and motive; its consequences are well defined, there being nothing ulterior; it is the practice of old and familiar transactions and has sufficed for their success."

In the instant case no premiums are given to induce the purchase of malt or brewed beverages. Those persons who choose to enter the contest are not required by the terms of the same to purchase anything to be eligible to enter the contest. The contestants are not required to accompany their entries with any evidence that a product of advertising company has been purchased.

The purpose of the advertising is to bring to the attention of the public the product advertised, i.e. Chevy Ale. When the product is sold the purchaser receives no premiums or prize. The article sold constitutes the only inducement to its purchase. The purpose of the prizes is only to make the advertisement more attractive to the public. No prizes or premiums are promised to the purchaser of Chevy Ale.

The premises considered it is my opinion that the A. B. C. Board is legally authorized to grant its approval of a proposed broadcasting program as outlined in your inquiry.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 19, 1943

Hon. E. B. Norton,
Superintendent of Education,
Capitol.

Schools—City Board of Education Traveling Expenses.

City Board of Education authorized to pay expenses of one of its members attending a meeting of the American Association of School Administrators.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of January 11, 1943, is as follows:

"Your opinion is requested on the following questions:

"1. Is it legal for a city board of education to pay for the maintenance and travel expenses of a member of the city board of education to a meeting of the American Association of School Administrators, which meeting is held outside of the State of Alabama?

"2. Are persons traveling in the service of a city board of education limited to a per diem expense of \$3, other than actual expense of transportation?"

It is my opinion that your first question should be answered in the affirmative.

City Boards of Education are provided for by Chapter 8 (Sections 148 through 176) of Title 52, of the 1940 Code. Section 151 of Title 52, provides in part as follows:

"The general administration and supervision of the public schools and educational interests of each city shall be vested in a city board of education."

Section 158 of Title 52 provides as follows:

"The city board of education is hereby vested with all the powers necessary or proper for the administration and management of the free public schools within such city and adjacent territory to the city which has been annexed as a part of the school district which includes a city having a city board of education."

Section 166 of Title 52 provides as follows:

"The city board of education shall exercise through its executive officer, the city superintendent of schools, and his professional assistants, control and supervision over the public schools of the city. The board shall consult and advise, with its executive officer and his professional assistants, principals, teachers, and interested citizens, and shall seek in every way to promote the interests of the schools under its jurisdiction."

Section 167 of Title 52 provides as follows:

"The city board of education shall determine, on the recommendation of the city superintendent of schools, and subject to the provisions of this title, the educational policy of the city, and shall prescribe rules and regulations for the conduct and management of the schools, and shall maintain separate schools for white and colored children."

It is seen from the above quoted sections that city boards of education are invested with control and supervision of, the right to determine the educational policy of, and **all the powers necessary or proper for the administration and management of the free public schools of the city.** A more comprehensive supervision and control could hardly be expressed.

In an opinion of this office rendered to Hon. J. E. Keller, Superintendent of Education, on November 1, 1937, Quarterly Report of Attorney General, Vol. IX, page 57, it was held that the expenditure of funds for the expenses of a member of the Jefferson County Board of Education incurred in going to Washington, to Montgomery, and certain points in Jefferson County, for the purpose of securing federal aid for school buildings, was an expenditure for public school purposes. It was also held in that opinion that funds expended for the expenses of teachers attending Peabody College for the purpose of receiving instruction from curriculum experts was an expenditure for public school purposes and that such expenditure fell within the purview of the phrase: "The equalization of educational opportunity of the public schools of the state."

In an opinion of this office rendered to the Chief Examiner of Accounts, dated June 16, 1928, Biennial Report of Attorney General 1926-28, page 601, it was held that sending a superintendent of education to a meeting of the National Educational Association was a promotion of the school interests of the county, and that the expenditure of school funds for such a purpose was authorized.

Title 52, Section 158, invests the various city boards with "all the powers necessary or proper for the administration and management of the free public schools within such city."

Certainly, if the schools are to be managed and supervised in a modern and efficient manner the board should keep up with advancements that are being made in school administration. Sending one of its members to a meeting of the American Association of School Administrators may not be absolutely necessary to efficient administration and management of the city schools, but clearly it could not be contended that such an act was not proper.

In an opinion of this office rendered to Hon. H. G. Dowling, Superintendent of Education of Tuscaloosa County, dated February 20, 1932, Biennial Report of the Attorney General, 1930-32, Page 714, it was held, in construing Section 198 of the 1927 School Code, (which section has been codified without change into the 1940 Code as Title 52, Section 158) that this section authorized the city board of education to pay the premium on the bond of the treasurer of the city school funds.

THEREFORE, the premises considered, it is my opinion that city boards of education have the authority to send one of its members to a meeting of the American Association of School Administrators, which is to be held outside of the state, and to pay the expenses of such trip.

In regard to your second question, your attention is directed to Code 1940, Title 41, Section 154, which provides as follows:

"The maximum amount allowable to persons traveling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expense of transportation shall be three dollars per diem . . ."

The balance of the section contains a list of those persons exempt from the three dollars per diem limitation and city boards of education are not contained in this list.

The question, therefore, of whether or not a person traveling in the service of a city board of education comes within the purview of the above quoted portion of Section 154 of Title 41, revolves itself into a determination of whether or not city boards of education are agencies of the state within the purview of said section.

There is now pending in the Supreme Court a case involving the City Board of Education of Birmingham. The style of this case is "State Ex Rel. Thomas S. Lawson, Attorney General, and the City Board of Education of Birmingham v. The State Board of Adjustment, and Olivia H. Fernandez."

The question presented for decision in this case is whether or not a City Board of Education is an agency of the state within the purview of the Code of 1940, Title 55, Section 334.

In my opinion the decision of the Supreme Court in this case will govern the decision here. If the Supreme Court holds that the city board of education is an agency of the state within the purview of Title 55, Section 334, then in my opinion a city board of education is also an agency of the state within the purview of Code of 1940, Title 41, Section 154 and a person traveling for such a board would be limited to a per diem expense of three dollars other than actual expense of transportation.

If the Supreme Court should hold to the contrary, then it would be my opinion that persons traveling in the service of the city boards of education would not be limited by Title 41, Section 154.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 23, 1943.

Miss Lucile Golden,
Clerk, Circuit Court,
Elmore County,
Wetumpka, Alabama.

Clerk—Sheriff—Issuing Subpoenas—Service—Solicitor—

1. The clerk is entitled to pay for re-subpoenaing witnesses. Sheriff is entitled to pay for serving same. Witnesses so subpoenaed entitled to pay.

2. Solicitor may have additional witnesses subpoenaed apart from those appearing before the grand jury.

Opinion by Assistant Attorney General Haynes.

Dear Madam:

Your request for an official opinion bearing date of February 19, 1943, is as follows:

"Will you kindly give me your opinion on the following matter?

"Is the Clerk entitled to fee for issuing State subpoenas for each term of court, and may the Sheriff collect fee for serving **more** than once? If the State thinks it necessary to add additional witnesses, other than appeared on the Grand Jury docket, will the Clerk and Sheriff be entitled to their fees? Also, will the witness be entitled to fee each term of court?"

My answer to each of your questions above propounded is in the affirmative.

My conclusion is supported by an opinion of this office written March 1, 1941, to Hon. J. Beaman Hawk, Clerk of the Circuit Court, Marshall County, Guntersville, Alabama, Quarterly Report of the Attorney General, Vol. XXII, page 151. You will note, however, the opinion I am referring to was based on an Act of 1931, page 668, which is now Title 15, Sections 294 and 295, Code 1940. You will note Section 5619, Code 1923, has been materially amended by the Act of 1931, *supra*, and these amendments are shown under Chapter 14, Title 15, Code 1940.

Certainly the solicitor can subpoena any witness he thinks proper and is not limited to only those witnesses who were subpoenaed and attended before the grand jury in any case. See Title 15, Section 291, which is as follows:

"§291. Subpoenas for state witnesses.—The clerk must also issue subpoenas for all witnesses on the part of the state, whose names are so

marked on the indictment, if any, and for such other witnesses as the solicitor may direct him to summon."

When witnesses are resubpoenaed or additional witnesses are subpoenaed, the clerk is entitled to his fee for issuing such subpoenas, and the sheriff is entitled to pay for summoning them. In this connection I call your attention to Title 11, Section 89, where it says:

"Each subpoena issued 25c"

Likewise the sheriff is entitled to pay for serving subpoenas on witnesses to attend court. In this connection I call your attention to Title 11, Section 100, Code 1940, where it says:

"For serving each subpoena, notice or scire facias 50c."

Witnesses summoned under any of the conditions above enumerated are entitled to their attendance. I call your attention to Title 11, Sections 44, 45 and 46, Code 1940, which are as follows:

"§44. Fees of witnesses for mileage and attendance.—Witnesses are allowed one dollar and fifty cents per day in civil cases; also five cents per mile for each mile to and from their residence by the usual traveled route, and all necessary ferriage, tolls of turnpikes and toll bridges, whether attending under subpoena, or at the request of the party.

"§45. Certificates to witnesses.—After the trial, continuance of the cause, or discharge of the witness, the clerk must, on his application, and upon his oath, give him a certificate, setting forth the cause in which he was a witness, the party by whom he was summoned, or on whose request he attended, the number of days he attended as a witness, and the sum to which he is entitled for his attendance, travel, ferriage, and tolls, which he must also enter, either upon the subpoena docket, or book to be kept for that purpose.

"§46. Attendance; when proven.—The witness must prove his attendance within five days after his attendance as such witness."

I may suggest further that you also read Title 11, Section 47, Code 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 24, 1943.

Mr. Ralph W. Roberts, Director,
Bureau of Vital Statistics,
Department of Public Health,
Capitol.

Health Department—Vital Statistics—Title 22, § 7, (6), § 37, Code of 1940.

Health Department authorized to promulgate rules requiring amendment to birth or death certificate to be attached to original.

Opinion by Assistant Attorney General Lurie.

Dear Sir:

Your request for an official opinion, dated February 9, 1942, is as follows:

"Several days ago during our conference you stated unofficially that this Bureau has no authority to alter birth certificates that have been accepted, filed and indexed and are now permanent public records.

"Due to the fact that we are called upon to make corrections in entries on certificates now on file in such a quantity that fully fifty per cent of the time of the staff is absorbed in this phase of work, I am particularly anxious to be guided by your decision in this matter. Discontinuance of our policy of making corrections will be a departure from current and past practices and will likely result in adverse complaint and criticism by citizens of Alabama. However, by dispensing with numerous corrections and correspondence pertaining thereto we shall be able to greatly increase our output of certified copies of our records.

"I hereby request that you provide us with an official ruling in the matter of corrections for our guidance and for general circulation among county health officers and local registrars.

"Attached is a copy of a proposed amendment to Title 22, Section 37, of the 1940 Code of Alabama. I would like to have your opinion as to the consistency of this amendment with your construction of health laws under the above Title."

It is my opinion that the Department of Health has ample authority, through the general powers vested in it, to prescribe the manner in which corrections may be made upon certificate of birth or death by Title 22, § 7 (6), which provides as follows:

"To adopt and promulgate rules and regulations providing proper methods and detail for administering the health and quarantine laws of the state, which rules and regulations shall have the force and effect of law and shall be executed and enforced by the same courts, bodies,

officials, agents, and employees, as in the case of health laws and a quorum, as provided for by the constitution of the medical association of the State of Alabama, shall be competent to act when written approval of any measure has been obtained from each of the other members of the board."

Section 37 of Title 22, Code of Alabama, 1940, provides as follows:

" *** but no certificate of birth or death, after it is accepted for registration by the local registrar, and no other record made in pursuance of this section, shall be altered or changed in any respect, otherwise than by amendment properly dated, signed, and witnessed *** "

Thus it may be seen that a correction may be made by amendment properly dated, signed, and witnessed, and this amendment may be attached to the permanent record in accordance with any rule or regulation of the Health Department.

I am unable to find any provision in the health laws of our state requiring the correction to be made by way of erasure upon the face of the permanent record.

I am of the further opinion that the amendment suggested by you, enclosed in your communication of February 9, is not necessary to vest authority in your department to promulgate a rule requiring a correction to a birth or death certificate, or any other record, made in pursuance of Title 22, by attaching or affixing such correction to the original rather than making such correction in the face of such permanent record.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 25, 1943.

Hon. Perry B. Hughes, Jr.,
Clerk, Circuit Court,
Tuscaloosa County,
Tuscaloosa, Alabama.

Witness Fees—Attendance—Different Courts—

Title 11, Section 47, and Title 11, Section 111, Code 1940, refer to witnesses attending in more than one case in the same court on the same day and does not refer to witnesses attending two different courts on the same day.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion bearing date of February 22, 1943, is as follows:

"Please give me your official opinion on Title 11, Section 111 of the Code of Alabama of 1940 which is as follows:

"'A witness for the state attending in more criminal cases than one on the same day, shall only be entitled to fees in one case, to be selected by him while so attending.'

"I, as Clerk of the Circuit Court, am also Ex-Officio Clerk of the Inferior Court and pay witnesses in both courts. Both courts are held in the County Courthouse. I would like to know if a witness when summoned, and appears in behalf of the State in both the Inferior and Circuit Courts on the same day, if that witness is entitled to his witness fee in both courts."

Your request calls for a construction of Title 11, Section 47, and Title 11, Section 111, Code 1940, which are as follows:

"§ 47. Witness only to charge one party and to receive pay only in one case for the same day.—A witness shall charge for his mileage and attendance but on one side of the same cause, and a witness attending in more cases than one at the same time shall only be entitled to a fee in one case, to be selected by him while so attending; but if, after the case in which he elects to claim his fees is disposed of, his attendance is required in the other case, or cases, he shall for such attendance be entitled to claim his per diem in such other case, or if more than one, in the one which he may elect to claim his fees; and so on until all the cases in which he is required to attend are disposed of by trial, continuance, or otherwise; but no witness shall receive his per diem in more than one case for the same day."

"§ 111. Fees of state witnesses when subpoenaed in more cases than one.—A witness for the state attending in more criminal cases than one on the same day, shall only be entitled to fees in one case, to be selected by him while so attending."

I am of the opinion that the only practical construction that can be placed on these two sections is that each refers to witnesses attending the same court on the same day. To construe them otherwise would bring about endless confusion as the fees often in inferior courts differ materially from witness charges in the circuit court or probate court or even justice of the peace court.

Therefore, I am of the opinion that a witness would be entitled to his attendance in each court without regard to his attendance in the other. I think the language of the above-quoted sections suggests that they refer to a witness attending in the same court who has been summoned in two or more cases.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 25, 1943.

Mr. Joe V. Robinson, Chairman,
Winston County Highway Board,
Double Springs, Alabama.

Counties—Roads and Bridges—Winston County Highway Board—
Officers—Code of 1940, Title 41, Section 211.

1. Winston County Board authorized to purchase used vehicles, for which bids must be received.
2. Unlawful for member of Winston County Board to sell truck to county.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for my official opinion, bearing date of January 9, 1943, is as follows:

"As Chairman of Winston County Highway Board, which was created by local statute passed for Winston County, Alabama, during the year 1939, I desire an opinion on the following proposition:

"The Board is charged with the handling of the road and bridge funds for the county and with working the roads and building bridges in the county and has authority to purchase road machinery and equipment for use in discharging their duties.

"We have been unable to purchase pickup trucks for use in the discharge of our official duties and we are much in need of this equipment. We have found where we could purchase from individuals trucks that are owned by them and which have been used at fair prices.

"1. Can we legally purchase these vehicles and pay a fair price for them out of the road and bridge funds?

"2. Could we purchase a second hand truck from a board member at a fair price and pay him out of the public funds in our hands?

"3. In purchasing second hand trucks would it be necessary that we advertize for bids as we do in the purchase of new machinery?"

The Highway Board of Winston County was created by Act No. 333, House No. 815, approved September 5, 1939, Local Acts, 1939, page 221. Section 3 of said Act provides as follows:

"That said Highway Board is hereby invested with the general and exclusive jurisdiction, control and superintendence of public roads, bridges and ferries, and public road and bridge funds and money in Winston County, Alabama, and may and shall do and perform all acts and exercise all jurisdiction and perform all the duties relative to the public roads, bridges and ferries in said County, to the construction, maintenance, repair and superintendence and working thereof, and to the collection of road taxes in said County and the enforcement of the collection of said road taxes. And said Highway Board and its members shall have and exercise all the jurisdiction, rights, powers and authority over said public roads, bridges and ferries in Winston County, Alabama, and over the public road and bridge funds and money of said County and over the collection of the road taxes and the working of the roads in said county, and shall perform all the services and duties relative to said public roads, bridges and ferries which are now or may hereafter be vested in or put upon Courts of County Commissioners, Boards of Revenue, or other County governing bodies or courts of like kind by the general laws of Alabama. All jurisdiction of the Court of County Commissioners of Winston County, Alabama, over public roads, bridges and ferries of Winston County and over the construction, maintenance and repair thereof, and all rights and/or authority of said Court of County Commissioners to control and expend the public road and bridge funds of said County are hereby abolished and repealed."

Section 7 of said Act, which specifically gives the Highway Board authority to purchase equipment and supplies to carry out the purposes of the Act, provides in part as follows:

" *** The Highway Board shall purchase all supplies necessary for carrying out the purpose of this Act and no purchase shall be made ex-

cept at a regular or adjourned meeting of said Board while it is in session and no contract or purchase shall be binding on Winston County made contrary to the provisions of this Act. The purpose and intent being to require all purchases to be made by the Board sitting as the Highway Board, provided, however, that the Highway Board, or the several members thereof may, in case of an emergency, purchase necessary repairs for machinery and contract for repairs of machinery when such supplies or repairs are not in excess of \$200.00 without complying with the provisions of this Act. **No contract for the purchase of any supplies for the County to be used in carrying out the provisions of this Act, road or bridge materials, tools, trucks, machinery or other equipment necessary for the carrying out of the provisions of this Act shall be made, nor any contract be made for the construction, maintenance, or repair of any bridge or road, except to the lowest responsible bidder after advertising as hereinafter provided unless otherwise provided in this Act.** Where the amount of the purchase to be made or contracts to be let is in excess of \$100.00 and less than \$500.00, two weeks written notice must be given that bids will be received for such purchases or contracts, by posting same on the bulletin board at the front of the courthouse door and shall also notify responsible business houses or dealers who deal in such products or merchandise requesting submission of bids for same; and the records of such notices to such business establishments shall be made at the regular meeting of the Highway Board after the giving of such notice and same shall become a part of the records of said Board and a list of the bids so submitted by each of the business establishments and the acceptance of any bid shall be put on the records of the Board and, if the amount of the purchase to be made or the contract to be let be in excess of \$500.00, notice must be given that bids will be received for such purchases or contracts by advertising same for a period of fifteen days by publication once a week for two consecutive weeks in a newspaper published in Winston County, Alabama. The Highway Board shall compare the bids submitted or contracts let for any material purchased under the provisions of this Act, with the price schedule of the Division of Purchases and Stores of the State Department of Finance of the State of Alabama and if the same quantity and quality of material can be bought from the state stores cheaper than any bid submitted, then it shall be the duty of the Highway Board to purchase said material through the division of Purchases and Stores of the Department of Finance of the State of Alabama. **Any and all contracts made and entered into or purchases made by the Highway Board of Winston County, in violation of the terms of this Act shall be null and void and it shall be unlawful for the Chairman of the Board to issue a warrant in payment of same.**" (Emphasis supplied)

In view of the above quoted sections, it is my opinion that the first inquiry must be answered in the affirmative. Used motor vehicles would come within the provisions "Trucks, machinery, or other equipment necessary for the carrying out of the provisions of this Act," as well as new trucks.

In connection with the second question your attention is directed to Code of 1940, Title 41, Section 211, which provides as follows:

"County officers interested in county contracts.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor,

or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers; but this section shall not be construed to prevent the court of county commissioners, board of revenue, county commission or other governing body of the county from employing as attorney to such governing body an attorney who holds an office which does not preclude him from practicing law and does not require his full time and for which, as such officer, he is compensated on a per diem or fee basis, nor shall it be construed to prevent the treasurer in lieu of a county depository from being employed as clerk to the court of county commissioners, board of revenue, county commission or other governing body of the county." (Emphasis supplied.)

The trucks, of course, are to be purchased for the county, and it is my opinion that a member of the Highway Board of Winston County is a county officer within the purview of Section 211, supra. It would, therefore, in my opinion, be unlawful for a member of the Highway Board of Winston County to sell a truck belonging to him to the county.

It is my opinion that your third question must be answered in the affirmative in view of the explicit language of Section 7 of Act 333, supra.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 25, 1943.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Privilege Licenses—Census—Reclassification—Title 1, § 14, Code of Alabama, 1940.

The reclassification date for determining the amount of license rated according to the population of a town, city, or county, is August 2, 1943.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for official opinion, bearing date of February 18, 1943, is as follows:

"House Bill 233 S-221 by Lusk approved August 16, 1939 reads as follows:

"Section 1. That the ninetieth day after the first day of the first regular legislative session held next after the publication by the Federal Government of the regular Federal Decennial population census for Alabama is hereby fixed as the date for any reclassification under any law requiring classification based on such said census.

"Please interpret for me the purpose of that bill as it is affected by the legislature which convened in January and which will again convene in May in this respect, does the 90 day period referred to in the bill begin from the date of the organization session in January or will it begin when the legislature convenes in May? I will appreciate it if you will specify by date on what day Probate Judges should issue license based on new population classifications under the aforementioned bill."

Section 1 of H. B. 233, § 221, approved August 16, 1939 (General Acts, 1939, page 388) set out by you in your inquiry was carried forward into the Code of 1940 as Title 1, § 14.

This office in an opinion to Hon. Homer F. Mitchell, Judge of Probate, Cullman County, Alabama, under date of September 27, 1940 (Quarterly Report of Attorney General, Vol. 20, page 351), held that "the reclassification date for determining the amount of license where rated according to population of a town, city, or county, will be on the ninetieth day after the first day of the next regular session of the Alabama Legislature to be held in 1943." You will find attached hereto a copy of this opinion. Cf. Opinions to Hon. G. B. Robinson, Judge of Probate, Pickens County, Alabama, under date of July 12, 1940 (Quarterly Report of Attorney General Vol. 20, page 47) and to Hon. Herbert Evans, Anniston, Alabama, rendered under date of August

10, 1940 (Quarterly Report of Attorney General, Vol. 20, page 143).

The sessions of the Legislature to which you refer in the third paragraph of your inquiry are set out in the Constitution of Alabama of 1901, Amendment XXXIX, proposed by Acts 1939, Special Session, page 11, submitted July 11, 1939, and proclaimed ratified July 21, 1939, which Amendment provides in part as follows:

"The Legislature shall convene on the second Tuesday in January next succeeding their election and shall remain in session for not longer than ten consecutive calendar days. No business can be transacted at such sessions except the organization of the Legislature, the election of officers and the appointment of standing committees of the Senate and the House of Representatives for the ensuing four years, which election and appointment may, however, also be made at such other times as may be necessary, the opening and publication of the returns and the ascertainment and declaration of the results of the election for Governor. *** The Legislature shall convene in regular sessions on the first Tuesday in May of 1943 and on the first Tuesday in May in each second year thereafter until the date of meeting shall have been changed by Act of the Legislature and approved by the Governor."

In order to answer your inquiry specifically it will be necessary to determine on what date the first day of the first regular legislative session in 1943 is to be held.

It is an established rule of statutory construction that where the language of a statute is plain and unambiguous there is no room for construction. See Alabama Digest, Vol. 18, Statutes, Key No. 190, and cases cited thereunder.

Applying the above rule of statutory construction to the above set out parts of Amendment XXXIX, it is clear that the first regular legislative day of the legislative session in 1943 is on the first Tuesday in May, 1943, which day falls on May 4th.

Under Section 1 of H. B. 233, § 221, supra, the date set for reclassification under any law requiring classification based on the last Federal Census is the ninetieth day after the first day of the first legislative session held next after the publication by the Federal Government of the regular Federal Decennial population census by Alabama. Having determined that the first day of the first regular legislative session is to be held on May 4, 1943, it follows that the ninetieth day thereafter falls on August 2, 1943, which date is the date Probate Judges should issue licenses based on the last preceding United States census which is the census of 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

February 25, 1943.

Hon. E. P. Russell, Director,
Department of Corrections and Institutions,
Capitol.

Department of Corrections and Institutions—Office of Price Administration—

Department of Corrections and Institutions not subject to regulation by office of Price Administration in the matter of furnishing housing facilities to its employees at State prisons for the more efficient discharge of their duties in prison administration.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of February 13, 1943, is as follows:

"It is requested that this office be advised as to the status of our housing facilities immediately adjacent to the State penitentiaries with respect to the Office of Price Administration's authority to regulate housing on State-owned lands.

"Each penitentiary has a number of dwelling houses, apartment houses and a hotel for the convenience of those officials termed essential to the operations of each unit on twenty-four hour call. Although these facilities are not without charge, they do, in a measure, compensate the employee in low housing cost for his constant availability for duty.

"The Department does not anticipate any increase in its now fixed prices on hotel, apartment or resident accommodations, but we would like to clarify a situation that has arisen as to the authority of the Office of Price Administration to issue jurisdictional regulations on these properties."

In connection with your inquiry I have read the act of Congress approved January 30, 1942, called Emergency Price Control Act of 1942 (50 U. S. C. A. 1942, Pocket Part, p. 212—56 Stat. 23). The act purports to be enacted "in the interest of the national defense and security," and for "the effective prosecution of the present war." Its avowed purpose, among other things, is "to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices and rents," and to "eliminate and prevent profiteering" etc.

At the very outset, Section 1(c), it is provided that it "shall be applicable to the United States, its Territories and possessions, and the District of Columbia." This language, I think, excludes its application to the several states. *Expressio unius exclusio est alterius.* 59 C. J. 984, § 582.

In my opinion this declaration of the field of operation of the act, so to speak, is conclusive to the effect that it was not the intention of Congress thereby to embarrass or interfere with the sovereign states in the exercise of their reserved governmental powers, such, for instance, as the punishment of crime and the administration of their penal laws by operation of penitentiaries and prisons.

Otherwise a grave constitutional question would arise, if the act in question be construed to apply to a state in the exercise of its governmental functions. It is a well-settled canon of construction, in state and federal courts alike, that where a statute is susceptible of two constructions, one of which would render it unconstitutional or of doubtful validity even, on constitutional grounds, and the other of which would free it of doubt on such grounds, the latter construction will be indulged. *State v. Merrill*, 218 Ala. 149; *Wilkinson v. Stiles*, 200 Ala. 279; *Interstate Commerce Comm. v. Oregon-Washington &c.* 288 U. S. 14; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337; *Goodman v. Carroll*, 205 U. S. 305.

From your inquiry I understand, of course, that the state is not engaged in renting houses as a business or for commercial purposes at or near its prisons; and that it maintains and rents to its employees housing accommodations at its prisons for the more efficient discharge of their duties as such employees, solely as an incident of their employment, and not for revenue or profit.

The fact that the act of Congress in question does not purport to apply to the several states, their agencies, instrumentalities and departments, whereas it might readily have been so phrased, shows conclusively, to my mind, an absence of legislative intent to interfere with state governmental function by any of the elaborately detailed provisions of the act, obviously intended as announced in the act itself, "to prevent speculation, unwarranted and abnormal increases in prices and rents," and "to eliminate and prevent profiteering."

It is elemental law that for purposes of construction resort may be had not only to the language and arrangement of a statute, but also to the object to be secured and extrinsic matters and circumstances attending its enactment.

"The State and its agencies are not to be considered as within the purview of a statute, however comprehensive and general the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles or interests of the state would be divested or diminished; or liabilities imposed on it ***." 59 C. J. 1103, citing:

In *Re Tidewater Coal Exchange*, 280 F. 648;

Davis v. Coyle, 260 U. S. 721, 67 L. Ed. 481;

State v. Brewer, 64 Ala. 287;

State v. McCord, 203 Ala. 347, 83 So. 71;

Dollar Savings Bank, 19 Wall 227, 22 L. Ed. 80;

California Iron Yards Co. v. Comm. Int. Rev. 47 F. 2d. 514.

The presumption also obtains that it is the legislative intent to exclude the state from the operation of a statute for the reason that laws are ordinarily made for the government of citizens and not the state. **Morris v. State**, 212 P. 588, 88 Okla. 189.

I am unable to see any relation between the objects and purposes of the act and the administration by the State of Alabama of its prisons, including the terms of employment and the furnishing of living quarters to its employees for the more efficient discharge of their duties.

I am of opinion therefore that the office of Price Administration is not authorized to regulate housing furnished by the State to its employees in connection with their duties and employment in administration of state prisons.

Yours very truly,

WILLIAM N. McQUEEN,

• Acting Attorney General.

March 3, 1943.

Hon. W. H. Holcombe,
Sheriff, Mobile County,
Mobile, Alabama.

Sheriffs—Fees for Costs—Commission for Collecting Principal
Sum—

Where the sheriff has an execution in his hands for collection which includes the cost of the suit and the principal sum of the judgment and he collects the principal sum of the judgment, he is not entitled to any fee for collecting costs. However, on the other hand, if he has an execution in his hands for the collection of costs only and he collects the same no matter what the amount may be he is entitled to \$1.50.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of February 27, 1943, is as follows:

"Section 34 of Title 11 of the Code of Alabama for 1940, relating to fees allowed Sheriffs, reads in part as follows:

"'Collecting execution for cost only \$1.50

"'Collecting money under execution: For the first two hundred dollars, five percent; for collecting all sums over two hundred dollars, up to and including five hundred dollars, four percent; and for collecting all sums in excess of five hundred dollars, three percent; but no commission shall be collected on costs.'

"Is the Sheriff of Mobile County, whose compensation is by salary rather than by fees or commission, required, in collecting money under an execution issued on a judgment for a specified amount, together with costs of court, to collect and pay into the County Treasury the commission specified by the statute on the principal amount of the judgment and also a fee of \$1.50 for collecting costs? Or is the fee of \$1.50 only allowed when the execution is issued for the collection of other costs only?

"For example, in collecting under execution a judgment for \$200.00, together with court costs in the sum of \$18.75, should the Sheriff collect as fees and commission only 5% of the face amount of the judgment, viz. the sum of \$10.00, or may he collect 5% of the face amount of the judgment together with \$1.50 for collecting costs, making a total of \$11.50?

"A similar question was asked of a former attorney-general, but the opinion does not fully answer the question I have in mind."

In answering your request, I take the paragraph in your request which you use as an example, which I think makes clear the matter you have in mind. The paragraph is as follows:

"For example, in collecting under execution a judgment for \$200.00, together with court costs in the sum of \$18.75, should the Sheriff collect as fees and commission only 5% of the face amount of the judgment, viz the sum of \$10.00, or may he collect 5% of the face amount of the judgment together with \$1.50 for collecting costs, making a total of \$11.50?"

If you have an execution for collection as sheriff in which the principal sum is \$200 and costs of the suit and you collect the full amount of \$200, you would be entitled to \$10 commission for collection and would not be entitled to the \$1.50 for collecting the costs.

You will notice that Title 11, Section 34, Code 1940 (Section 7287, Code 1923) provides in part as follows:

"For collecting execution for costs only \$1.50."

This paragraph of this section means just what it says, which is if the execution is for costs only (which oftentimes is true) and you collect it, you receive \$1.50 as your fee. You get no commission for collecting costs. I call your attention to Title 11, Section 34, supra, where it says:

"But no commission shall be collected on costs."

The \$1.50 designated by statute above quoted is for collecting an execution for costs only where there is a judgment for a principal sum and you collect the judgment and the costs, you are not entitled to anything for collecting costs. Quarterly Report, Attorney General, Vol. XXIII, page 113; Quarterly Report Attorney General, Vol. XXV, page 76.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 4, 1943.

Hon. Simon Wampold,
Chief Clerk,
Probate Office,
Montgomery County,
Montgomery, Alabama.

Code 1940, Tit. 51, § 495(1), (2)—Licenses—Money Lenders—Code 1940, Tit. 51, § 838—

A person licensed to do business as a money lender under Code 1940, Tit. 51, § 495 is not authorized also under such license to purchase occasionally conditional sales contracts, notes of acceptance and mortgages.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of February 25, 1943, is as follows:

"Anyone purchasing a license under Schedule 495.2, and in the course of their regular business they occasionally purchase a Conditional Sales Contract, are they liable under 495.1? In other words, if they purchase a license under Section 2, does this carry the privilege of making loans and also purchasing occasionally Notes of Acceptance and Mortgages?"

Code 1940, Tit. 51, § 495 imposes a license (1) on "each person engaged in discounting or buying conditional sales contracts, drafts, acceptances, notes or mortgages on personal property," based upon the amount of capital employed in such business and varying from \$5 to \$300; and also (2) "each person engaged in the business of lending on salaries or making industrial or personal loans." See also Revenue Act 1935, pages 256, 476, Section 348, Schedule 93½ (1), (2).

Thus it appears that it was the legislative intent to classify separately and impose separate licenses with respect to the two above-described businesses or occupations.

Code 1940, Tit. 51, § 838 (Revenue Act 1935, pages 256, 561, § 356) provides that "where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business."

Inasmuch, therefore, as for purposes of taxation the business or occupation of discounting conditional sales contracts, etc., and the business of lending money on salaries or making industrial or personal loans, are separate and distinct businesses or occupations, for each of which a license is imposed, I am of opinion that a money lender, so-called, (Tit. 51, § 495(2))

is not authorized to engage in the business also of occasionally purchasing conditional sales contracts, "notes of acceptance and mortgages," without also taking out a license for the latter form of business.

The foregoing is in harmony with the former rulings of this office. See Quarterly Report, Attorney General, Volume VIII, page 115, Biennial Report, Attorney General, 1936-38, page 365.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 8, 1943.

Hon. E. B. Norton, Superintendent,
State Department of Education,
Capitol.

Teachers who hold Emergency Provisional Certificates or Non-Professional Defense Certificates are not "regularly certified" and therefore cannot attain continuing service status.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

I have your request for official opinion under date of February 17, 1943, which is as follows:

"Section 351 of Chapter 13 of Title 52 of the Code of Alabama of 1940 reads as follows:

"The term teacher as employed in this chapter is deemed to mean and include all persons regularly certificated by the teacher certifying authority of the State of Alabama who may be employed as instructors, principals or supervisors in the public elementary and high schools of the State of Alabama."

"The State Board of Education regularly issues certificates to teachers based upon the fulfillment of definitely prescribed courses of professional training.

"Due to the shortage of teachers who can meet the prescribed requirements, the State Board of Education is also issuing non-renewable Emergency Provisional Certificates which are valid for one year only, and non-renewable Non-Professional Defense Certificates which are valid for

two years only, to persons who do not meet the professional training requirements for regular certificates.

"Your opinion is requested on the following questions:

"Are teachers who hold Emergency Provisional Certificates or Non-Professional Defense Certificates 'regularly certificated'? Can such teachers attain continuing service status under the provisions of Chapter 13 of Title 52 of the Code of Alabama of 1940?"

The questions which you present are confined to Code of 1940, Title 52, Section 351 et seq. (Chapter 13), providing for the tenure of employment of teachers and are concerned only with the scope and definition of the phrase "regularly certified" as therein used.

Code of 1940, Title 52, Section 323, provides that:

"It shall be the duty of the state superintendent of education to submit for the approval of the state board of education from time to time rules and regulations governing the issuance, renewal and extension of certificates and to have printed a bulletin or bulletins which shall contain full information relating to the issuance, renewal or extension of certificates ***."

Pursuant to the duty and authority imposed upon him by Section 323, supra, the superintendent of education has promulgated certain rules and regulations setting forth in detail the requirements and qualifications necessary for eligibility to the various types of teachers' certificates.

The obvious intent of the legislature in enacting such provisions was to provide certain standards to be complied with by members of the teaching profession, such standards to be more accurately defined by the educational authorities of the State.

Anticipating a situation where there were no available persons who could meet the professional requirements for such certificates, the legislature enacted the statute set forth in the Code of 1940, Title 52, Section 328, which reads as follows:

"§ 328. Provisional certificates.—The state superintendent of education in cases of emergency may grant provisional certificates of the different kinds and grades, but a provisional certificate shall not be valid for a period to exceed one year and such provisional certificate shall not be extended or renewed. (1927 School Code § 345.)"

In order to further meet the problem of shortage of professionally qualified teachers, the superintendent of education issued a bulletin providing for the issuance of "Non-professional Defense Teachers Certificate" valid for only two years, non-renewable and expressly limited to those persons not qualified for "any type of regular Alabama certificate."

The intent of the legislature in Code of 1940, Title 52, Section 351, having

for the purposes of the Chapter relating to tenure of employment, limited the definition of the term "teacher" to those "regularly certified," was that only those persons who had met the prescribed professional requirements and qualifications set forth in the rules and regulations governing the issuance of certificates were to be included in the provisions of the said chapter.

The issuance of "provisional certificates" and "Non-professional Defense Certificates" is expressly an emergency measure and, not being subject to the usual requirements, do not come within the contemplation of the term "regularly certified."

Furthermore, Code of 1940, Title 52, Section 352, provides that to attain continuing service status "such teachers shall have served under contract as a teacher in the same county or city school system for three consecutive years and shall thereafter be re-employed in such county or city school system." Inasmuch as the "provisional certificates" and the "Non-professional Defense Certificates" are valid for only one and two years respectively, and non-renewable, the holders of such certificates are automatically precluded from attaining the continuing service status because of the requirement of serving three consecutive years. Even though the holders of such certificates later meet the requirements of the professional certificates, their period of service under the emergency certificates cannot be included in computing the "three consecutive years" for the reasons hereinabove stated that they were not during such period "regularly certified."

Yours very truly,

WILLIAM N. MCQUEEN,

Acting Attorney General.

March 8, 1943.

Hon. J. H. Sims,
Judge of Probate,
Bullock County,
Union Springs, Alabama.

Court of County Commissioners—Expenditures—Circulars offering a reward—

The Court of County Commissioners is not authorized to pay for the printing of circulars offering a reward for apprehension of a fugitive.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of February 19, 1943 is as follows:

"Your opinion is requested on the following matter:

"During October, 1941, a local printing concern, on order from the Sheriff of Bullock County, printed a number of circulars, offering a reward for the apprehension of a fugitive wanted for murder, a copy of said circular being enclosed herewith.

"The printer filed his bill, amounting to \$7.05, in this office on October 31, 1941. At the time, I could not find any authority for the county to pay this bill, and have not since been able to do so.

"Your opinion is requested as to whether or not the Court of County Commissioners of Bullock County can legally pay this bill at this time."

It is my opinion that the question presented by your inquiry must be answered in the negative.

In an opinion rendered to Hon. Chas. W. Lee, State Comptroller, under date of July 3, 1935 (Opinions of the Attorney General, Office Edition Vol. 5-A, page 15), this office held that the Court of County Commissioners of Jefferson County had no authority to pay a reward for the capture of an escaped convict. See also Biennial Report of Attorney General, 1930-1932, page 62, in which it was held that the Court of County Commissioners was without authority to pay a reward for the capture and conviction of a murderer. Also Quarterly Report of Attorney General, Vol. XVII, page 398.

The question presented by your inquiry is analogous to the questions presented and answered by the opinions referred to above.

"It is a well established rule of law that money can not be expended

by the county unless there is a direct statute authorizing such expenditure, *** ." Biennial Report of Attorney General 1928-1930, page 981.

I can find no statute which authorizes the Court of County Commissioners to pay for the printing of circulars printed on an order from the sheriff offering a reward for the apprehension of a fugitive.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 9, 1943.

Hon. H. G. Dowling,
Commissioner of Revenue,
State Department of Revenue,
Capitol.

Board of Equalization—

Vacancies to be filled in accordance with Title 51, Section 91, Code of Alabama, 1940, and not Title 41, Section 177, Code of Alabama, 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

This will acknowledge receipt of your request for official opinion dated February 23, 1943, which is as follows:

"A number of resignations and one vacancy by death have recently occurred among memberships of County Boards of Equalization. The old law creating these Boards seems not to have been brought forward into the new Code; and the provision for filling vacancies, as shown under Section 91 of Title 51 in the new Code, seems to become effective only after August 1943.

"I am asking your official opinion on this question:

"Should vacancies on such Boards of Equalization be filled under the provisions of Paragraph 177, Title 41 of the Code or Paragraph 91 of Title 51?"

In my opinion, such vacancies should be filled under the provisions of Title 51, Section 91, Code of Alabama, 1940, and not under Title 41, Section 177.

On March 15, 1939, an Act "To create a County Board of Equalization in and for each of the sixty-seven Counties *** " was approved, General and Local Laws, 1939, p. 178. This Act besides creating the County Boards of Equalization abolished the Boards of Review. General and Local Laws, 1939, p. 189, Section XXII.

Section II of said Act (1939, p. 178) provides that within thirty days after the passage of the Act the several nominating authorities in the county (Court of County Commissioners, County Board of Education, municipalities of the County) shall submit to the State Commissioner of Revenue a certain number of names of persons qualified for appointment to the Board of Equalization. It is further provided in this section that "the members of the several County Boards of Equalization appointed from the nominees as in this section provided shall hold office from the date of qualification and their terms of office shall expire on September 30, 1943."

It is apparent from reading Section II of the Act (1939, p. 178) that the Legislature was providing specially for the original or first term of office of members of the county boards of equalization. It is also apparent that Section II is not of a permanent nature since it deals only with the term of office from 1939 to September 30, 1943. And for this reason it is not in the Code of 1940 (See Title 1, Section 9).

Section III of the Act (1939, p. 178) (Title 51, Section 89) as amended by an act (1939, pp. 827, 828) is the permanent or regular statute providing for the nomination and appointment and regular term of members of the board of equalization for terms beginning October 1, 1943, and each fourth year thereafter.

Section II (1939, p. 178) was not brought forward into the new Code but Section III, as amended, was. Title 51, Section 89.

The question then is whether Section V (Title 51, Section 91) (Acts 1939, p. 180) which provides for filling vacancies on the board applies to members appointed under Section II, supra. It is my opinion that Section V (Title 51, Section 91) does not apply to such members.

Title 51, Section 88, Code of 1940, provides "the members of the several county boards of equalization as **now constituted**, shall hold office until their successors are appointed and qualified under the provisions of the next succeeding section, and shall have the powers and perform the duties provided for in this Article."

There can be no doubt that this refers to those original appointees provided for in Section II (Acts 1939, p. 178), viz., those members whose terms are to expire September 30, 1943. These members (whose terms are to expire September 30, 1943) are "the members of the several county boards of equalization as **now constituted** *** ." (Title 51, Section 88.)

Title 51, Section 91 provides: " *** or should a vacancy on **any board** occur from death, resignation or any other cause, then the commissioner of revenue shall select from the remaining nominees *** ." The "board" re-

ferred to in this section, in my opinion, includes not only the members to be appointed from lists to be submitted in August, 1943, (Title 51, Section 89) but also the "boards of equalization as now constituted." (Title 51, Section 88.)

Thus in conclusion, Title 51, Section 91 provides for filling vacancies on "any board." The term "any board" refers to the "boards *** as now constituted" (Title 51, Section 89. Cf. Section II, Acts 1939, Section 178), and, therefore, vacancies should be filled in accordance with Title 51, Section 91.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 10, 1943.

Miss Mary Wilson Chapman,
Deputy Circuit Clerk,
Tallapoosa County,
Alexander City, Alabama.

Sheriffs—Fee on Execution

Sheriffs entitled to fee provided by Code of 1940, Title 11, § 34, on collecting money under execution and after judgment of affirmance on supersedeas, on the amount of the affirmed judgment, the ten per cent damages provided for in Code of 1940, Title 7, § 814, and on the interest due under Code of 1940, Title 9, § 63.

Opinion by Assistant Attorney General Moore.

Dear Madam:

Your request for an official opinion bearing date of January 29, 1943, is as follows:

"We would appreciate an opinion from you as soon as possible on the following:

"Title 11, Section 31 of the Code of Alabama, 1940, sets up the commissions allowed the Sheriffs for the collection of monies under execution. In issuing execution for a judgment, 10% damages, interest and costs, would this section be interpreted to mean that commissions were to be figured on the judgment, damages and interest or would the commissions be figured on the judgment alone?"

Your request states that "Title 11, Section 31 of the Code of Alabama, 1940, sets up the commissions allowed the Sheriffs for the collection of monies under execution." These commissions are provided for in Title 11, § 34, Code of Alabama 1940, rather than in § 31 of said Title. Section 34 provides in part as follows:

"§ 34. Fees allowed to sheriffs.—Sheriffs are entitled to receive the following fees for the following services: ***

"Collecting money under execution: For the first two hundred dollars, five percent; for collecting all sums over two hundred dollars, up to and including five hundred dollars, four percent; and for collecting all sums in excess of five hundred dollars, three percent; but no commission shall be collected on costs."

In addition to the information set out in your request you inform me that the ten per cent damages to which you refer are the damages provided for in Title 7, § 814, Code of Alabama 1940, which section is as follows:

"§ 814. Judgment of affirmance on supersedeas.—When a judgment or decree rendered for money, whether debt or damages, and the same has been superseded on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also render judgment against all or any of the obligors on the bond, for the amount of the affirmed judgment, ten percent damages thereon, and the costs of the appellate court."

Title 7, § 506, Code of Alabama provides in part as follows:

"§ 506. Executions on moneyed judgments, and for recovery of personal and real property; forms of.—The party in whose favor a judgment is rendered, whether for debt, damages, or costs, for the satisfaction thereof, may, within ten years thereafter, have a writ of fieri facias against the lands and goods of the party against whom such judgment is rendered."

Title 9, § 63, Code of Alabama 1940 provides as follows:

"§ 63. Interest on judgments.—Judgments and decrees for the payment of money, other than costs, bear interest from the day of rendition."

Under the provisions of § 814 of Title 7, *supra*, the judgment of the Appellate Court is "for the amount of the affirmed judgment, ten percent damages thereon, and the costs of the appellate court." Under this section the ten per cent damages becomes part of the judgment of the Appellate Court. The Supreme Court of Alabama in the case of *Anniston Loan & Trust Co. v. Stickney*, 132 Ala. 587, 31 So. 465, held that on such a judgment that execution may issue only out of the court from which the appeal is taken. Under the provisions of Title 13, § 198, Code of Alabama 1940, it was your duty, as Circuit Clerk, to issue an execution on this judgment when requested to do so by the party in whose favor the judgment was rendered, as provided for by § 506 of Title 7, *supra*.

Title 9, § 63, *supra*, provides that judgments and decrees for the payment of money, other than costs, bear interest from the date of rendition. It was held by the Supreme Court of Alabama in the case of *Ijams v. Rice*, 17 Ala. 404, that interest that accrued on a judgment subsequent to its rendition may be collected under an execution issued on the judgment.

I am of the opinion that the Sheriff is entitled to the fee provided by Code of 1940, Title 11, § 34, on collecting money under execution and after judgment of affirmance on supersedeas, on the amount of the affirmed judgment, the ten per cent damages provided for in Code of 1940, Title 7, § 814, and on the interest due under Code of 1940, Title 9, § 63.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 10, 1943.

Hon. J. E. Kennedy,
Sheriff, Dallas County,
Selma, Alabama.

Sheriffs—Fees and Allowances—When on salary basis—

1. The sheriff may, if he sees proper, secure outside help that is apart from his deputies in running down crime but this will have to be at his own expense and not paid from county funds and may have such money refunded to him when not used.
2. The sheriff is without authority, whether he be on a salary or a fee basis, to pay out money for ferreting out crime and have refunded to him the same from any fund of the county or state.
3. The sheriff and his deputies are charged with the duty of ferreting out and running down crime and producing evidence but cannot be reimbursed from any county fund for money so expended in doing so.
4. The sheriff, being on a salary, is not entitled to informer's fee or any other fee provided by law individually but must collect all fees which go to his office from every source and pay the same into the county treasury.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of February 17, 1943,

is as follows:

"I would thank you for your opinion on the following statement of facts:

"1. I am Sheriff of Dallas County and am now on a salary basis, as are also my deputies, due to Constitutional Amendment adopted in 1940.

"2. Under the general laws of Alabama shown in Title 29, Section 134, of the Code, it is provided that any person convicted of violating the provisions of Sections 131 and 132 of this title shall be charged in the bill of costs the sum of \$25.00 to be allowed the person furnishing the evidence for conviction, etc. It costs actual cash to secure the help necessary to locate stills and persons operating them; the Sheriff secures outside assistance in no way connected with his office for this service, and with such outside help secures conviction and also the certificate of the Judge trying the case that such outsider is the person entitled to the \$25.00. Such outside help receives nothing from me for his services.

"3. In Title 29, Section 102, of the Code it is provided: 'Whenever any person is convicted in the circuit court of unlawfully distilling or manufacturing or making any of the prohibited liquors or beverages as defined by this title, there shall be charged in the bill of costs to be paid and collected as other items of cost, the sum of fifty dollars, to be allowed the sheriff or other officer or person who furnished the evidence and brought about the conviction, and who shall satisfy the presiding judge that he is the person entitled to said sum, and shall receive from the judge a certificate to that effect.'

"I desire an opinion on the following points:

"1. Would it be lawful for me to receive from the outside help a refund of any money I might advance him for his expenses?

"2. Would it be unlawful for me to secure such outside help and advance him any money for his expenses?

"3. Would I, being on a salary, be entitled to receive any money I might pay out in order to locate and secure the conviction of such offenders from any source?

"4. Am I confined strictly to my deputies in securing this information and am I allowed any expenses which may be incurred in securing such information and conviction?

"5. Would I, being on a salary, be entitled to receive the fifty dollars provided in Title 29, Section 102, and the twenty-five dollars provided for in Title 29, Section 134, of the Code, if I be the person furnishing the evidence that brought about such conviction?

"6. Should the Sheriff of Dallas County file a certificate claiming

the money provided for in each of the above sections of the Code and pay the same to the Treasurer of Dallas County, Alabama, or the portion thereof left after deducting items of expense?"

Answering your first question, which is

"1. Would it be lawful for me to receive from the outside help a refund of any money I might advance him for his expenses?"

I admit I do not exactly know just what condition you have in mind by this question. If you mean would you be allowed to furnish expense money individually to aid in investigating or running down crime and it was not used and the party desired to return same to you, there could be no objection to this but money so advanced must not be from any fund of the county nor can the funds of the county be used for this purpose.

Now, as to your second request, which is as follows:

"2. Would it be unlawful for me to secure such outside help and advance him any money for his expenses?"

Based on what I have said above in answer to your first request, it is my opinion you can obtain any outside help you may desire as long as you act individually and use your own money in so doing in a lawful way, but this likewise must be outside of any county funds and must be a personal matter.

Now as to your third request, which is as follows:

"3. Would I, being on a salary, be entitled to receive any money I might pay out in order to locate and secure the conviction of such offenders from any source?"

My answer to the above is in the negative. There is no law authorizing the expenditure of state or county funds for such purposes.

Answering your fourth request, which is as follows:

"4. Am I confined strictly to my deputies in securing this information and am I allowed any expenses which may be incurred in securing such information and conviction?"

You and your deputies belong to the executive department of the State Government under Constitution of 1901, Section 112, and it is your duty as sheriff to ferret out crime, to apprehend and arrest criminals, and insofar as within your power to secure evidence of crime in your county, and to present a report of the evidence so secured to the solicitor or deputy solicitor for the county. Title 54, Section 5, Subsection 4, Code 1940.

Of course, you may procure the services of any citizen to aid you in carrying out your duties but you cannot use state or county funds to pay for such

services. There is no provision of law that makes any appropriation from any state or county fund for paying any part of such expenses whether the sheriff be on a fee or salary basis.

Now as to your fifth request, which is as follows:

"5. Would I, being on a salary, be entitled to receive the fifty dollars provided in Title 29, Section 102, and the twenty-five dollars provided for in Title 29, Section 134, of the Code, if I be the person furnishing the evidence that brought about such conviction?"

My answer to the above is in the negative, you now being on a salary basis under constitutional amendment passed by the Legislature September 15, 1939, (General Acts, 1939, page 896). I call your attention to Section 1 of said act, which is as follows:

"Section 1. That the following amendment to the Constitution of Alabama is hereby proposed, and an election is hereby ordered, by the qualified electors of the State of Alabama upon the proposed amendment and the day hereby appointed for the said election is the next general election held after the expiration of three months from and after the final adjournment of the present session of the Legislature. The proposed amendment is as follows: 'The salaries of the following named county officers of Dallas County, Alabama, but subject to the provisions of Section 281 of the Constitution of Alabama, are fixed as follows: Judge of Probate, \$6,000.00 per annum net; Tax Assessor, \$5,000.00 per annum net; Tax Collector, \$5,000.00 per annum net; Sheriff, \$4,800.00 per annum net; Circuit Clerk, \$2,400.00 per annum net; Register in Chancery, \$1,200.00 per annum net; provided, that if the same person holds the offices of Circuit Clerk and Register in Chancery, the salary for both offices shall be \$3,000.00 per annum net; members of the county governing body, exclusive of the Judge of Probate, \$600.00 each per annum net. The above named officers are hereby required to collect all charges of court, fees, commissions, allowances, percentages, salaries or other compensation provided by law, other than the salaries herein fixed, and to cover the same into the county treasury. This shall include the allowances or amounts received by the Sheriff for feeding prisoners from both the State and Federal Government, and the county governing body of Dallas County, Alabama, shall pay all the expenses incurred in feeding such prisoners out of the county treasury, but nothing herein shall be construed as interfering with the allowances or amounts provided by law for guards at the county jail or bailiffs for courts, or preventing the county governing body of Dallas County, Alabama, from making such allowances to the Sheriff and his deputies for transportation on official business, including the purchase of automobiles for such use, as it may deem necessary from time to time. The salaries of the above named county officers of Dallas County, Alabama, shall be paid out of the county treasury in equal monthly installments. 'The employees of said offices shall be selected by the respective officers, and allowances for their compensation shall be as follows: 1. Office of Judge of Probate—\$6,500 per annum. 2. Office of Tax Assessor—\$3,600.00 per annum. 3. Office of Tax Collector—\$2,600.00 per annum. 4. Office of Sheriff—\$4,500.00 per annum. 5. Office of Circuit Clerk—\$1,350.00 per annum. 6. Office of Register in Chancery—None. 'The county governing body shall have the same authority in regard to the employment

of persons for the county, and the fixing of their compensation, other than the employees in the above named offices, as provided by law. The salaries of the employees in the above enumerated offices shall be paid out of the county treasury in equal monthly installments; provided, however, that no payment of compensation for any such employee shall be made until the employee has actually rendered the service for which the payment is to be made. "The Legislature of Alabama is hereby authorized and empowered, from time to time, by general and local laws, to fix, regulate and alter the employment and compensation of the employees in said offices, including the number and the method and basis of their compensation. "The Legislature of Alabama is hereby authorized and empowered, from time to time, by general or local laws, but subject to the provisions of Section 281 of the Constitution of Alabama, to fix, regulate and alter the charges of court, fees, commissions, allowances, percentages, salaries or other compensation received by any officer of Dallas County, Alabama, other than the Judge of Probate, Tax Assessor, Tax Collector, Sheriff, Circuit Clerk and Register in Chancery, including the method and basis of their compensation.'"

You will note this section says in part:

"The above named officers are hereby required to collect all charges of court, fees, commissions, allowances, percentages, salaries or other compensation provided by law, other than the salaries herein fixed, and to cover the same into the county treasury." (Emphasis supplied)

Therefore, any fee, such as informer's fee or fee of like nature due you or your deputies, must be paid into the county treasury. Quarterly Report of Attorney General, Vol. VI, page 15; Quarterly Report of Attorney General, Vol. IV, page 154; Attorney General's Report, Office Edition, Book 3-A, page 62.

I have been unable to find any enabling act passed by the Legislature relative to this constitutional amendment but I do not see that this could affect the matter you have one way or the other as any enabling act which might have been passed or which might be passed in the future would have to follow the amendment as to the matter involved in your question.

Now, as to your sixth question, which is as follows:

"6. Should the Sheriff of Dallas County file a certificate claiming the money provided for in each of the above sections of the Code and pay the same to the Treasurer of Dallas County, Alabama, or the portion thereof left after deducting items of expense?"

My answer to the first part of your sixth question is in the affirmative, that is to say you should collect these fees and cover the same into the county treasury. There is no authority of law for you to deduct any sum or amount out of the fees for expenses.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 11, 1943.

Mr. W. O. Dobbins, Jr., Director,
State Planning Commission,
Capitol.

State Planning Commission—Zoning Ordinances—Restrictive covenants as to use of land—

1. Restrictive covenants as to use of land do not affect the validity of a zoning ordinance purporting to include in a residential district or zone unimproved land of which the use is restricted to business purposes under such covenants.

2. The validity or enforcement of such covenants, as affected by a zoning ordinance can be determined only by a court of competent jurisdiction when the question is properly raised by some property owner affected by such covenants.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

This will acknowledge your request for official opinion, dated March 6, 1943, which is as follows:

"The City of Tuscumbia has certain areas that are under deed restrictions, which constitute a contract between the subdivider and the present property owners and which are enforceable both by the subdivider and by the various property owners. The proposed zoning plan for this city, which has been prepared by their municipal planning commission, will include within a residential district certain lots that have already been restricted by deed restrictions to business use only.

"If the City of Tuscumbia adopts their zoning ordinance in its present form, could the zoning ordinance be construed to have invalidated the deed restrictions that specify that certain lots shall be used for business purposes only? The crux of the problem is whether the deed restrictions, which are already in existence, will remain in force regardless of any zoning plan adopted by the city. Or can a zoning plan alter existing deed restrictions regardless of how much they may be unjustified? If the deed restrictions will still remain in force, is there any procedure by which they can be amended?

"Furthermore, we wish to ask whether a zoning ordinance that runs contrary to deed restrictions should be set aside in part or in full as being illegal. We are attaching as a supplement a case that was cited in the discussions of the Tuscumbia Planning Commission meeting of February 19, 1943."

It is well settled that private, individual contract and property rights, among which may be included rights and obligations arising from covenants

running with the land, are subject to and must give way to the exercise of police power, when properly challenged.

As said in 3 **McQuillan on Municipal Corporations** (2d ed) § 1027, p. 316: "The familiar principle long since established and enforced is that it is indispensable to curb the freedom of the individual for the good of the community in matters of safety, health, morals and general welfare," that is to say, to safeguard the rights of the community as a whole.

On this principle, in the leading case of **Euclid v. Ambler Realty Co.**, (1926) 272 U. S. 365, 71 L. ed 303, after exhaustive review of prior authorities, the validity of a zoning ordinance was sustained with respect to segregation, in broad, general terms, of business and residential districts or zones, as a valid, reasonable exercise of the police power.

In that case it was contended that enforcement of the ordinance would greatly impair the value of unimproved land which in the natural, normal course of development was destined for industrial or business uses, by restricting the use of the land to residential use. The court upheld the segregation as valid exercise of the police power, but took occasion to remark:

"It is true that when if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, *** to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions *** to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character *** which, if attacked separately, might not withstand the test of constitutionality."

I am of opinion therefore that the fact that under its zoning ordinance the City of Tusculumbia has included within a residential zone property which by reason of covenants between grantor and grantee is restricted to use for business purposes, is immaterial to the question of the validity of the ordinance, and should not of itself affect the judgment of the zoning commission or board.

"Such zoning and restricting ordinances contemplate orderly planned development of the city as a whole; the city council must not be bound to adhere to plat restricting; to do so would bind and circumscribe a modern city in its orderly planning by plat restrictions made many years previous when the conditions were entirely different; then, too, such plat restrictions may be set aside by mutual agreement or a proper judgment of a court of equity." **Oklahoma City v. Harris** (1941) (Okla.), 126 P. 2d, 988.

Such inclusion, however, does not of itself operate to destroy or impair

or invalidate the covenants as between grantor and grantee. That question can be adjudicated only by a court of competent jurisdiction when properly raised. Nor do the "deed restrictions" operate to invalidate the zoning ordinance.

Your inquiries are in such general terms as to admit of an answer only in general terms. Until some property owner by appropriate procedure in court raises the question as to validity of the ordinance in its application to the particular facts and circumstances relating to his property, it is impossible to form or express an opinion or to prophesy or forecast what the final decision as to validity might be. These questions cannot be anticipated or foreclosed by any action on the part of the zoning commission or board. It should proceed with its planning and administration of the zoning ordinance, however, without regard to the existence of the restrictive covenants.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 11, 1943.

Hon. Felton W. Garrick,
Clerk, Circuit Court,
Clarke County,
Grove Hill, Alabama.

Local Act of Clarke County which seeks to regulate the fine and forfeiture fund of said county, found in Local Acts of 1907, page 57, held unconstitutional and void as to Section 2 of said act, as violative of Section 96, Constitution of Alabama, 1901.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion bearing date of February 5, 1943, is as follows:

"When I assumed the office of Circuit Clerk I found that witnesses in criminal cases were being paid and had been paid for a number of years in accordance with a local act applying only to Clarke County, Alabama, which is found in Local Acts of the Legislature of Alabama of 1907 at pages 57 to 59. The State Examiners in making an audit of my office recently raised the question that this was not the proper method of paying State witnesses and witnesses appearing before the grand jury but the general law on the subject should be followed.

"I wish to propound to you two questions in connection with the payment of witnesses in criminal cases.

"1. Please advise whether the local act of the Legislature of Alabama applicable only to Clarke County found in Local Acts of 1907 at pages 57 to 59 was repealed by the General Acts of the Legislature of Alabama of 1932 at page 102, which enactment now appears as Section 103 of Title 11 of the Code of Alabama of 1940.

"2. Please advise me whether said local act of 1907 above referred to is in conflict with Section 96 of the Constitution of Alabama of 1901.

"In this connection I wish to advise you that I have consulted my attorney and he has made a study of the matter to some extent and referred me to the cases of Barnes, etc. vs. State ex. rel. Tate, 162 So. Page 404 and Barnes, etc. vs. State ex. rel. Tate, 162 So. Page 406. It seems to me that these two cases are in point and for that reason at the suggestion of my attorney I am calling the same to your attention."

It is my opinion that the Local Act of Clarke County, No. 46, H. 86, approved February 15, 1907, (Local Acts 1907, page 57) is unconstitutional and void as to Section 2 of said act, which section is as follows:

"Section 2. That State witnesses in attendance before the grand jury of said county shall be entitled to a certificate from the foreman of the grand jury for the sum of one dollar per diem, for attendance and three cents per mile traveling each way, while attending court; and the State witnesses in attendance upon the circuit court shall be entitled to a certificate of attendance and for mileage in like sum and at the same rate as provided for witnesses before the grand jury in this section, to be signed by the clerk of the court; and the foreman of the grand jury and clerk of the circuit court shall state in the face of the certificates so issued to such witnesses the number of days allowed such witnesses, and the number of miles travelled."

In this connection I call your attention to Section 96 of the Constitution of 1901, which is as follows:

"Sec. 96. The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

You will note that witness fees and compensation in criminal cases are fixed by the Code of 1896, Section 4886, the same as fees and compensation of witnesses in civil cases. Section 1336, Code of 1896, fixes witness fees in civil cases at \$1.50 per day and mileage at five cents per mile is as follows:

"1336. Fees of witnesses for mileage and attendance.—Witnesses are allowed one dollar and fifty cents per day in civil cases; also five cents per mile for each mile to and from their residence by the usual traveled route, and all necessary ferriage, tolls of turnpikes and tollbridges, whether attending under subpoena, or at the request of the party."

The Code of 1907, Section 6659, fixes witness fees and compensation in criminal cases at \$1 per day and five cents per mile and is as follows:

"6659. Fees and compensation of witnesses.—Witnesses in criminal cases are entitled to one dollar per day and five cents for each mile to and from their residence by the route usually traveled, and all necessary ferriages and toll."

Title 11, Section 103, Code 1940, fixes witness fees at seventy-five cents per day and five cents per mile for travel. The Code of 1896 and the Code of 1907 and the Code of 1940 fix such mileage at a different sum from your Local Act, viz., five cents per mile for travel.

Therefore, it can be readily seen that your Local Act of 1907, *supra*, has never been in conformity with the general law fixing such fees and allowances of witnesses. Therefore, it is unconstitutional and void as to Section 2 of said act, as pointed out above. This opinion is consistent with and adopts the view expressed by this office in an opinion to Hon. V. H. Carmichael, Judge, County Court, Walker, Jasper, Alabama, Biennial Report of Attorney General, 1928-1930, page 427, wherein such a local act was held invalid and violative of Section 96 of Constitution of 1901. See *Daly v. Johnson*, 225 Ala. 6, 141 So. 909; *Barnes, Clerk v. State ex. rel. Tate*, 230 Ala. 596, 162 So. 406; *Birmingham Electric Co. v. Henry*, 215 Ala. 458, 111 So. 41; *Vaughan v. State ex. rel. Baker*, 212 Ala. 461, 103 So. 38.

Having held Section 2 of your Local Act of 1907 unconstitutional, it is not necessary to go into the question of whether or not it is repealed by the General Act of 1932, page 102, which said act appears as Title 11, Section 103, Code 1940. However, for the purpose of answering your first interrogatory your attention is directed to the case of *Isbell v. Shelby County*, 10 Ala. App. 636, 65 So. 706, which case is followed by our courts, in which the court, in dealing with principles directly related with the instant problem, stated:

"An inspection of the Act of 1907 (general act) makes it manifest that it was the general intent of the Legislature by that act to establish a uniform system throughout the state fixing the ex officio fees of the clerks of the circuit courts in the several counties in the state, and the presumption must be that the local acts on the same subject matter and inconsistent with it are intended to be repealed. 36 Cyc. 1090, 1091, and cases cited; 26 Am. & Eng. Ency. of Law (2nd Ed.) 733, 742, and authorities cited in note 2. Repeal by implication is not favored; yet, when two acts are in conflict, or the second revises the whole subject matter of the former, or is intended to set up a new system, or restate the entire law on the subject, the former is repealed. *Gibson v. Mabry*, 145 Ala. 112, 40 South. 297. See, also, *Edson v. State*, 134 Ala. 50, 32 South. 308; 3 Brick. Dig. 750, Sec. 49. Applying this cardinal canon of construction to the statutes under consideration, we are of the opinion that the adoption of the general act of 1907, repealed the local act of 1901 ***."

Thus, by the application of the above rule, the local act for Clarke

County in 1907 was repealed by the general act of 1932.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 11, 1943.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Code 1940, Title 51, §§ 655, 657—Gasoline Excise Tax—Counties—
County Gasoline Tax Warrants—State Comptroller—

1. Where county has authorized or requested monthly payment of state gasoline tax money, or any part thereof, to a bank as agent or trustee for holders of its gasoline tax warrants, the State Comptroller should continue to make such payments, so long as there are sufficient funds to the credit of the county to make the same.

2. In the event of insufficiency of funds to make such payments in full, payment should be made by State warrant to the county treasurer or depository of the entire amount due the county for the month as to which the insufficiency exists.

3. The State Comptroller is not authorized to adjudicate claims as to priority of payment of such funds, or to prorate the same among holders of warrants payable therefrom.

4. Counties are not authorized to refund or refinance their gasoline tax warrants payable exclusively from the state gasoline excise tax funds payable under Code 1940, Title 51, §§ 655, 657.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for my official opinion bearing date of February 6, 1943, is as follows:

"Re: Distribution of Gasoline Excise Tax to counties.

"Distribution of the counties' part of the Gasoline Excise Tax of 6c per gallon is made by this office not later than the 10th of each month, as per Title 51, Sections 655 and 657, Code of Alabama, 1940.

"Several of the counties have issued interest bearing warrants for the purpose of constructing public roads and bridges in the respective counties.

"By resolution of the county governing bodies, certain banks have been designated to receive monthly payments out of the Gasoline Excise Tax Funds to apply against the warrants issued, and have given the banks authority to endorse State warrants which are made payable to the county treasurer but forwarded to the designated banks.

"In other words, when we make the monthly distribution of the counties' part of the Gasoline Excise Tax, we show the counties' part of this tax, and make deductions of the amounts forwarded direct to the designated banks, and then send the county a State warrant for the remaining balance.

"On account of the severe shrinkage in receipts from the Gasoline Excise Tax, in a few cases the balance sent to the county treasurer after deduction has been made of the amounts to be forwarded direct to the designated banks is very small, and if the receipts from the Gasoline Excise Tax recede much further there is a possibility that there will not even be a sufficient amount to meet the monthly payments to the banks to apply against warrants issued by the counties.

"We would like to have your official opinion on the following points:

"1. Is there any limit as to the amount of the counties' part of the Gasoline Excise Tax which can be forwarded to the several banks by this office to apply against the interest bearing warrants issued by the counties? In other words, if necessary, can we legally forward the full monthly distribution of a county's part of the Gasoline Excise Tax to the designated banks to apply against interest bearing warrants issued by the county and forward no amount direct to the county?

"2. In case the monthly amount of Gasoline Excise Tax to be distributed to the county is not sufficient to make all payments to the various banks which have been requested by the county governing body, then shall we apply the amount available from the Gasoline Excise Tax to the oldest issues of warrants first, or shall we prorate the available amount over the various payments due the banks?

"3. If a county governing body finds the monthly assignments on gas warrants will exceed the monthly Gasoline Excise Tax distribution, does it have the authority to refinance any or all of the county gas warrants issued?"

✓ Code 1940, Title 51, Sections 655, 657 expressly require payments to the counties out of the State Excise Gasoline Tax "to be made by state warrant to be mailed to the treasurers of such counties or depositories of such counties, on or before the tenth day of each month following collection." See also Revenue Act of 1935, General Acts 1935, pages 256, 441, 511, 512, Section 348, Schedules 156.9 and 156.11.

With this language before it the Supreme Court has held as follows:

"These instruments are not warrants of the county in the true sense, but are merely evidences of transfer and pledge of definite funds to their payment. Their issuance amounts in effect to a sale by the county of the anticipated revenue to be derived from the gasoline tax allocated by the state to the county for these purposes. There is no county obligation to pay, and the funds received from a sale of these instruments, denominated warrants, are in no sense a borrowing of money." **Isbell v. Shelby County**, 235 Ala. 571, on page 574, 180 So. 567.

Accordingly in an opinion of this office rendered November 9, 1939, to Hon. B. G. Robison, Judge of Probate, Pickens County, (Quarterly Report, Attorney General, Vol. XVII, page 202) it was ruled that a county might without intervention of the county treasurer or depository authorize direct payment of its monthly gasoline tax allocation, or any part thereof, to a bank serving as agent or trustee for such purpose with authority to accumulate such funds to pay interest and principal due by said warrants as they mature.

This was based upon the observation in **Isbell v. Shelby County**, supra, on page 574, in response to the contention that sale of the warrants and payment of proceeds thereof to the county treasurer did not comply with the provisions of the statute issued whereby such payments were to be made directly by the State Tax Commission to the State Highway Department. Revenue Act, 1935, Section 348, Schedule 156.11, page 512. In response to the contention the court said: "But this is a difference in form only and not of substance, an administrative feature with which the section was not concerned, except in a general way."

I understand from your letter that heretofore payments have been made directly to banks as agents or trustees for holders of these warrants, pursuant to directions or instructions from county governing bodies, but that there is now a threatened insufficiency of funds available to the counties out of the State Gasoline Excise Tax to pay all these so-called assignments or pledges monthly as they become payable.

I am of opinion, therefore, that you should continue to make payments as directed by the county governing bodies so long as there are sufficient funds with which to make the same, and that when it develops in any particular instance that there are not sufficient funds to pay monthly all so-called assignments to the banks you should then resort to the plain mandate of the statute itself and pay over to the county treasurer or depository by warrants mailed to them the entire monthly amount payable, without regard to the so-called assignments.

I find no authority of law whereby you may determine priority of payment as among two or more assignees, so to speak, of this fund, or prorate the fund among them. To undertake to do so would be usurpation of judicial power.

In response to your inquiry numbered 3, I am of opinion that county governing bodies are not authorized to refinance or refund so-called county

gasoline tax warrants. The holders of such warrants must look to the county's gasoline tax fund alone for payment. As said *Isbell v. Shelby County*, supra, page 574: "There is no county obligation to pay." Nor have I been able to find any statutory authority whatever for any such refunding or re-financing on the part of the county.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 11, 1943.

Hon. H. G. Dowling, Commissioner,
State Department of Revenue,
Capitol.

Department of Revenue—Use Tax—Code 1940, Title 51, §§ 785,
806—

Department of Revenue not authorized to grant discounts for
prompt payment of use tax.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

This will acknowledge your request for official opinion, dated March 5, 1943, which is as follows:

"Under the provisions of Section 785, Title 51, Code of Alabama, 1940, the Governor is authorized by executive order to provide by rules and regulations for the allowance of a discount not to exceed 3% of the sales tax if paid before delinquent. Such discount has been made effective with respect to the sales tax.

"In view of the fact that the Use Tax is construed as a companion measure, a compensatory tax, to prevent a practical discrimination against sales made within the State subject to the sales tax, a question has arisen as to whether a similar discount should be allowed to vendors collecting and reporting use tax.

"Therefore, your official opinion is respectfully requested as to whether the Department is authorized, in the exercise of the power to adopt rules and regulations for the enforcement of the use tax (Section 806, Title 51), to adopt a regulation allowing a similar discount to vendors or sellers who make payment of the use tax to the Department before the same becomes delinquent."

While it is true that the Sales Tax and Use Tax may be said to be companion measures and complementary one to the other, and both of them follow the same general pattern, I am unable to find any authority of law whereby the Department of Revenue, in the exercise of its authority "to prescribe, adopt, and enforce rules and regulations" relating to administration of the Use Tax Act (Code 1940, Title 51, § 806) may allow discounts for prompt payment, as contemplated, although by virtue of Title 51, § 785, a discount is allowed with respect to sales tax.

Although companionable and complementary so to speak, yet the two acts are separate and distinct, each complete in itself, and I can find no basis for importing or incorporating in one of them some provision of law relating exclusively to the other of them.

The fact that the legislature, while vesting in the Department of Revenue the customary and conventional rule and regulation power, for administrative purposes as to both acts, (Title 51, §§ 781, 806) saw fit to provide, expressly and separately, for the discount power by a separate section in the Sales Tax Act only, is conclusive in my opinion to the effect that the department may not by administrative construction grant discounts in execution of the Use Tax Act. Such an attempt would amount to the exercise of legislative power by an executive agency contrary to Section 43 of the Constitution of 1901.

To grant such discounts upon the payment of the use tax would also, in my opinion, violate possibly Section 100 of the Constitution in all cases where the use tax had accrued, in that it would amount to a release, remission, or diminution, pro tanto, of an obligation of the state. Taxes accrued to the state are an obligation or liability within Section 100. **Union Bank and Trust Company v. Phelps**, 228 Ala. 236, 153 So. 644.

The foregoing answers also your inquiry of February 23.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 12, 1943.

Hon. J. W. Sharpton, President,
Board of Revenue,
Etowah County,
Gadsden, Alabama.

President, Board of Revenue, Etowah County—Salary and allowances—

Between the time of enactment of Local Acts of Alabama, 1927, page 187, and the repeal of the same by Local Acts of Alabama, 1939, page 193, the President of the Board of Revenue of Etowah County, in addition to the fixed salary of \$1,200 per annum, was entitled to \$3 per day for presiding over the meetings and keeping the minutes of the Board, and to fifteen cents for each one hundred words for recording the minutes and proceedings of the same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your request for official opinion under date of December 10, 1942, which is as follows:

"As President of the Board of Revenue of Etowah County, Alabama, I respectfully request an opinion on the following matter, to-wit:

"After being duly elected as President of the Board of Revenue of Etowah County, Alabama, I assumed my duties as such on January 17, 1937, and have filled this place continuously since said date and I desire to know from you if I am entitled to collect the ex-officio fees for the performance of my duties as President of the Board of Revenue as is provided by the 1927 Local Acts of Alabama on page 187, which said Acts I am informed continued in full force and effect until same was repealed by the 1939 Local Acts on page 193. If I am entitled to said fees, please state in your opinion the amount I am entitled to and for what dates it covers.

"The Federal census of 1930 for Etowah County disclosed that there were 62,000 citizens living in this county.

"I am enclosing herewith claims and drafts covering the time that I rendered said services except from January 1, 1939 until September when the last above mentioned act was passed."

Section 7 Local Act No. 267, H. 905 (Local Acts 1927, page 187), the statute upon which you base your claim, and which remained in effect until its repeal by the Local Acts of Alabama, 1939, p. 193, reads as follows:

"§7. The president and each associate member of the board shall re-

ceive a salary of \$1,200 per annum, payable in equal monthly installments on the last day of each month out of the funds of the county. The president of said board shall receive, in addition to the above specified amount, the same compensation as allowed the probate judge for his services as principal judge of the court of county commissioners. Neither the president nor the associate members of the board shall be entitled to draw any mileage or per diem."

By virtue of said Section 7, in addition to a salary of \$1,200 per annum, you are allowed the same compensation which the probate judge gets for his services as principal judge of the Court of County Commissioners. Under the general law (Code of 1940, Title 12, Section 5) the judge of probate is designated the principal judge of the Court of County Commissioners, and by virtue of Code of 1940, Title 12, Section 19, has the duty to record the proceedings of the Court of County Commissioners and issue all orders and processes therefor.

As compensation for the duties outlined in the foregoing paragraph, Code of 1940, Title 11, Section 29, provides as follows:

"Presiding in court of county commissioners and keeping minutes
of such court, for each day 3.00.

"For recording minutes and proceedings of commissioners' court,
for each one hundred words15."

Therefore, Section 7 of the Local Acts of 1927, *supra*, providing that the President of the Board of Revenue of Etowah County shall receive the same compensation as allowed the probate judge for his services as such principal judge, entitles you to the fees stipulated in Code of 1940, Title 11, Section 29, *supra*, for the period you rendered such services up to the time of enactment of the statute (Local Acts of 1939, page 193) repealing the said Section 7 of the Local Acts of 1927.

You are not entitled to the \$400.00 ex-officio fees allowed the probate judge for the duties performed in connection with roads and bridges.

This opinion is to be substituted for the letter written to you under date of January 16, 1943.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 16, 1943.

Hon. B. G. Farmer, Sheriff,
Houston County,
Dothan, Alabama.

Fees of Sheriff—Arrest and Guard—

1. Where a defendant is bound over to the grand jury, after an investigation or waiver and the grand jury later indicts the sheriff would be entitled to an arrest fee and if the defendant is actually placed in jail he would also be entitled to guard fee. Also where the case is placed on the grand jury docket by the foreman of said jury or the solicitor and an indictment is returned, the sheriff would be entitled to an arrest fee and if defendant was placed in jail he would be entitled to guard fee.

2. Where the defendant is arrested charged with crime and is given a preliminary investigation and bound over to await the action of the grand jury and no bill is found, the sheriff would not be entitled to an arrest fee nor a guard fee out of the fine and forfeiture fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of March 4, 1943, is as follows:

"I respectfully request your opinion on the following questions:

"(1) Title 11, Section 100, provides for certain fees for the Sheriff for executing warrants or writs of arrest in felony cases. Title 15, Section 169, provides that a writ of arrest must be issued by the Clerk forthwith after the finding of the indictment against each defendant when an order is made by the judge presiding when the indictment is returned by the grand jury commanding that writ of arrest issue. Title 15, Section 173, provides that a writ of arrest may be executed by the sheriff of any county in the state or by his deputy.

"A defendant is arrested on a felony charge and waives to the action of the grand jury, or after preliminary hearing is placed under bond to await the action of the grand jury, or the case is placed on the grand jury docket without preliminary hearing or without the defendant waiving to the action of the grand jury. When the indictment is returned against the defendant, he is not present to surrender; and the presiding judge orders that writ of arrest shall issue and fixes the amount of his bond. Then the sheriff executes this writ of arrest. Is he not entitled under this state of facts to another arrest fee even though the defendant was under bond to await the action of the grand jury or his bond was made returnable to the next session of the county court? Also, is the

sheriff not entitled under this state of facts to another guard fee even though the defendant's status is as above stated?

"(2) A defendant is arrested on a felony charge and waives to the action of the grand jury or after the preliminary hearing is placed under bond to await the action of the grand jury, or the case is placed on the grand jury docket without preliminary hearing or without the defendant waiving to the action of the grand jury. The grand jury returns no bill. Under this state of facts, is the sheriff entitled to an arrest fee and/or guard fee from the fine and forfeiture fund?"

My answer to your first request is in the affirmative, except where the defendant is not placed in jail. Guard fee is simply a turnkey fee and unless the defendant is actually placed in jail this fee does not attach. Biennial Report of Attorney General, 1928-30, page 194; Quarterly Report of Attorney General, Vol. XVIII, page 84; Quarterly Report of Attorney General, Vol. XVIII, page 86; and Quarterly Report of Attorney General, Vol. XVIII, page 375.

I think, perhaps, it is necessary to say here that you state a condition that can never happen on a preliminary investigation. I quote from your request, "or his bond is made returnable to the county court," but such bonds cannot and are never made returnable to the county court but must be to the circuit court or a court of like jurisdiction having a grand jury. I might in further explanation say that where a defendant is bound over to the grand jury and allowed bail and he makes same, then if the defendant is indicted this bond carries the case on into the circuit court and no further arrest is required unless the presiding judge makes an order for his rearrest, refusing bond or changing the amount of the original bond. Biennial Report of the Attorney General, 1934-36, page 484.

In answer to your second request, it is my opinion, under the circumstances you detail where the grand jury fails to indict the sheriff could not collect costs which may have accrued to him out of the fine and forfeiture fund of the county. I base this conclusion on the following authorities: Quarterly Report of Attorney General, Vol. XVII, page 43; **Hawkins ex rel. v. F. B. O'Brien v. State**, 124 Ala. 102.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 17, 1944

Hon. Hunter Phillips,
Judge of Probate, Choctaw County,
Butler, Alabama.

Judge of Probate—Fees for Distribution of monies—

Judges of Probate may not charge any fee or commission for money paid into court and distributed in sales of real estate for division.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your request for official opinion bearing date of March 10, 1943, which is as follows:

"Recently I have had several large tracts of land sold for division among joint owners. After the sale was made the money is turned over to me as Judge of Probate, for distribution. I will appreciate it very much if you will advise me as to the amount of commission I am allowed for disbursing this money."

In reply to your request you are advised that in my opinion you are not entitled to any fee for distributing the monies as outlined in your letter.

Title 11, Section 29, page 275, Code of Alabama, 1940, fixes the fees allowed Judges of Probate for their services in Alabama. There is not allowed by law any commissions to Judges of Probate for money paid into the probate court and distributed by the said court for the sale of real estate for division.

Title 11, Section 1, of the 1940 Code, expressly says:

"The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law. No provision of this title shall repeal any statute relating to costs or fees, which by its express terms was not intended to apply to all the counties of this state."

Therefore, it will be seen that the law expressly forbids the charging of any costs or fees not embraced in Title 11, Section 29, of the Code of 1940, of Alabama, and I so hold. Cf. Quarterly Report Attorney General, Volume 11, page 109.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 17, 1943.

Hon. G. Claiborne Blanton,
Judge of Probate,
Dallas County,
Selma, Alabama.

Code 1940, Tit. 7, § 427—Authentication of copies of records by probate judge—

The Judge of Probate may pursuant to Code 1940, Tit. 7, § 427 authenticate copies of records in his office as judge and ex officio clerk of the Probate Court, without intervention of the Chief Clerk.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of March 13, 1943, is as follows:

"I will appreciate your advice on the following question:

"The attached sample copy of authentication of record was passed on to me by Judge Vaughan and has been used in this office apparently for some time. I notice in Title 13 at Page 608 the first reference on the left hand margin of the page, the case being United States v. Bedgood, 49 Fed. 54, 56, states that the judge is not clerk of the Probate Court and refers to Chapter 297 of this title. Paragraph 6 of said Chapter authorizes the Probate Judge to employ a chief clerk at his own expense.

"Title 7, Chapter 428 states that the Probate Judge should make such authentications and further that the Clerk of said Court shall certify under his hand and seal of his office that the said presiding judge is duly commissioned and qualified. The last sentence of Paragraph 5, Section 300, Title 13, reads, 'all of the official acts of such chief clerk must be performed in the name of the Judge of Probate, except when there is a vacancy in that office.'

"Please advise me if in making authenticated copies of wills and other documents I should follow Title 7, Section 428 by affidavit of my own, leaving the clerk out of the picture, or should his certificate also be used. Of course, he has no seal of office."

While under Code 1940, Tit. 13, § 297, Par. 6, the judge of probate is authorized, at his own expense, to employ a "chief clerk" and such other clerks as he deems necessary, the duties of the chief clerk are not prescribed by statute, and his authority is restricted to certain specific ministerial acts, which must be "performed in the name of the judge of probate" (his employer). Nor does there seem to be any requirement of law that such chief clerk must be employed at all. Employment vel non is apparently optional

with the judge of probate.

On the other hand the statute expressly prescribes the duties of the judge of probate; among them the duty to issue citations and other clerical process; to keep and record the minutes of the court; to keep books, records and papers belonging to the office; to keep a docket, etc.—all of them decidedly clerical in nature, and such as are ordinarily performed by the clerk of a court, having both judge and clerk. Code 1940, Tit. 13, § 280(1-6).

Said Section 280, Par. 7 also requires him “to give transcripts of any paper or record required to be kept in his office, properly certified,”—decidedly a clerical operation as that term is ordinarily understood.

Clearly then the judge of probate may be said to be also ex officio clerk of his court, although the statute may not so label him in so many words. And it is equally clear that he may, if he wishes, conduct the affairs of his office and fully discharge its duties without the intervention of a chief clerk or any other kind of clerk.

I am of opinion therefore that the form of authentication for a copy of a will which you have submitted for examination sufficiently complies with the requirements of federal law, and that such authentication may be properly made by you as both judge and ex officio clerk of your court, without certification by your chief clerk or any other clerk you may have employed in your office. 28 U. S. C. A., § 687, as annotated on page 480, Note 57, and numerous authorities there cited. (R. S. 905); Code 1940, Tit. 7, § 427.

In Note 57, on page 480 of 28 U. S. C. A., § 687 it is said: “A certificate of the same person as judge and ex officio clerk is a substantial compliance with this section.” And after diligent search I find no authorities to the contrary.

The case to which you refer, **United States v. Bedgood**, 49 F. 54 (1891) was an indictment in the U. S. District Court for the Southern District of Alabama, for perjury based on an affidavit made by defendant before N. R. Leigh, “judge and ex officio clerk” of the Probate Court of Escambia County, Alabama. On demurrer the court held the indictment bad for that the judge of probate was not a clerk of a court of record within the purview of the statute under which the indictment was drawn. In my opinion this case is immaterial to the instant question.

Nor am I able to see how “Title 7, Chapter 428” (Code 1940, Tit. 7, § 428) has any bearing on the question. It is copied from 28 U. S. C. A., 688 (R. S. § 906). The preceding Section 427, Tit. 7, Code 1940 is copied from 28 U. S. C. A. 687 (R. S. § 905) under which, as above noted, it has been held in many jurisdictions that one person may certify both as judge and ex officio clerk for the authentication of a copy under the federal statutes.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 17, 1943.

Hon. J. B. Hawk,
Clerk, Circuit Court,
Marshall County,
Guntersville, Alabama.

Sheriff's fees for serving subpoena duces tecum—Clerk's fees for issuing same—

There is no particular fee provided for issuing a subpoena duces tecum by the clerk or serving the same by the sheriff, except the regular fees fixed by statute for issuing and serving subpoenas.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of March 12, 1943, is as follows:

"Will you please advise me what would be the proper fee to charge for the Circuit Clerk for the issuance of a subpoena Duces Tecum, and also for the Sheriff, for the service of the same in both Civil and Criminal cases?

"The Clerk is entitled to a fee of 25c for issuing subpoenas in Criminal cases, and 30c in Civil cases, he is also entitled to a fee of 50c for issuing notices in Criminal cases, and 75c in Civil cases. Since a subpoena Duces Tecum is both a subpoena and a notice I would like to know what would be a proper charge in each instance, that is in both Civil and Criminal cases and as to fees for both the Sheriff and the Clerk."

The clerk of the circuit court is entitled to twenty-five cents for issuing all subpoenas in criminal cases whether it be an ordinary subpoena or a subpoena duces tecum. See Title 11, Section 89, Code 1940, which has to do with fees of clerks of circuit courts in criminal cases, where it says:

"For each subpoena issued 25."

A subpoena duces tecum is a subpoena nevertheless and is not a notice but a command although it carries with it a command for the production of certain documents or things. In civil cases he is entitled to thirty cents for issuing a subpoena. See Title 11, Section 21, Code 1940, which has to do with fees and allowances of clerks in the circuit courts in civil matters, where it says:

"Issuing subpoena for each witness 30."

The sheriff is entitled to a fee of fifty cents in criminal cases for serving subpoenas, etc. See Title 11, Section 100, Code 1940, where it says:

"For serving each subpoena, notice or scira facias 50."

He is entitled to sixty-five cents for serving subpoenas for witnesses in civil cases. See Title 11, Section 34, Code 1940. This section has to do with fees of sheriffs in civil cases.

"Summoning each witness and returning subpoena 65."

Issuing of subpoenas, both in criminal and civil matters, by the clerk and serving the same by the sheriff includes all forms of subpoenas for witnesses whether it be an ordinary summons or a subpoena duces tecum.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 17, 1943.

Hon. C. H. Albritton,
Judge of Probate,
Wilcox County,
Camden, Alabama.

Wilcox County may use, for purchase of its outstanding warrants sold to raise moneys to construct and improve roads and bridges, any portion of such moneys remaining unexpended following abandonment of the purposes for which the warrants were issued. Such purchases are not within the scope of Local Act No. 436, approved September 13, 1939, requiring letting of contracts only after advertisement for bids.

Opinion by Acting Attorney General.

Dear Sir:

Your request for an official opinion bearing date of February 9, 1943, is as follows:

"Wilcox County has received a refund from the State Highway Department of approximately \$88,000; such refund was brought about by the inability of the State to finish certain roads in the County due to war conditions. The County deposited these funds with the State Highway Department for the construction of roads and bridges in the County. The source of the money to the County was from the sale of gasoline tax revenue anticipation warrants.

"Now that this money has been refunded, the County wishes to purchase \$66,500 par value of such outstanding gas tax revenue warrants with

these funds at a price deemed to be the reasonable market value thereof by the County.

"Please give us your opinion as to the authority of the County to purchase such warrants, and if the purchase can be made may the County pay what it considers the reasonable market value on them.

"Also, please give us your opinion whether such a purchase if authorized violates the general laws of Alabama or the provisions of the Henderson Act, since the County has not advertised for bids or tenders, but wishes to purchase these particular \$66,500 warrants."

The copies of the resolutions of the Court of County Commissioners of Wilcox County submitted to me show that over a period of years the county has sold six issues of its warrants of which parts are now outstanding, which warrants are not general obligations of the county but are payable solely out of revenues to be distributed to the county derived from the state gasoline tax. The proceedings pertaining to one of such issues of warrants provide that the warrants were issued for "constructing, surfacing and improving" roads and bridges in the county. The proceedings authorizing the other five issues provide that they were issued "to construct and improve" roads and bridges in the county. All issues were sold by the county for cash. Obviously, the term "improve," as used in the proceedings authorizing the said five issues, is broad enough to embrace the term "surfacing" as used in the proceedings authorizing the said one issue, with the result that the general purpose of all six issues was the same, namely, to construct and improve roads and bridges in the county. Some of the proceeds derived from the sale of the warrants were deposited with the State Highway Department pursuant to contracts between that department and the county for the purpose of aiding in the cost of construction and improvement of roads and bridges in the county. As a result of the war, it has become impossible for the State Highway Department to complete such work and approximately \$88,000 of the moneys deposited with the State Highway Department were refunded by that department to the county. The county now desires to use a portion of the money refunded in the purchase for retirement of \$66,500 par value of said warrants having certain maturities.

It is a common practice in providing for the issuance of warrants for the issuing body to reserve the right to redeem or repurchase the warrants prior to their maturity. Since such a reservation is obviously within the power of the county as a part of the contract under which the warrants are issued, it would seem to follow that if the holder of a warrant is willing to permit such redemption or repurchase after issuance, then the county may when acting in good faith effect such redemption or repurchase. We, therefore, have the question of whether the particular funds proposed to be used for that purpose can be so used.

A court of county commissioners in Alabama, unless limited by a local act, has broad and unlimited legislative, executive and judicial power in the location, construction and improvement of roads and bridges in the county. That power is granted by Title 23, Section 43 of the Code of 1940. That statute has been very liberally interpreted by our Supreme Court to give full scope to its broad terms, to authorize the making of such contracts as the

court of county commissioners may deem necessary and advisable to carry out the powers conferred by the statute, and to uphold the exercise of the power as against judicial review in the absence of fraud, corruption or unfair dealing. **Court of County Commissioners of Pike County v. Johnson** (1934), 229 Ala. 417, 157 So. 481; **Ensley Motor Car Co. v. O'Rear, Treasurer** (1916), 196 Ala. 481, 71 So. 704. See also **Herbert v. Perry** (1937), 235 Ala. 71, 177 So. 561; **Isbell v. Shelby County** (1938), 235 Ala. 571, 180 So. 567; **Burleson v. Court of County Commissioners** (1938), 235 Ala. 576, 180 So. 572.

The broad power so granted to authorize the construction and improvement of roads and bridges necessarily implies the power to repeal any such authorization once it is given. As Dillon says in his work on Municipal Corporations, page 314, "the power to make includes the power to repeal." If that were not true, then once a resolution is adopted authorizing the work it could never be repealed even if conditions should so radically change as to make the performance of the work unnecessary or even impossible. The cases generally have sustained that implied power. In **Hudson Telephone Co. v. Jersey City**, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619, Justice Reed said of this implied power:

" *** it is a general power which exists, outside of the express power conferred by the charter, by reason of the right to pass ordinances *** ."

In **Stemmler v. Borough of Madison** (1912), 82 N. J. L. 596, 83 Atl. 85, Ann. Cas. 1913D, p. 767, the owner of a lot abutting on a proposed new street contended that the borough council did not have the power to repeal an ordinance providing for the laying out of the street. The court held to the contrary, saying:

"That the right to repeal is as much an incident of ordinary legislative action as the right to enact rests upon sound authority, and hence must in reason be included among those powers that pass by the natural implication that if recognized at all, as it must be, cannot logically stop short of giving full effect to the legislative will as thus construed.

"That this should be so is illustrated by a case like the present, in which an ordinance is passed at the very inception of a proceeding that in its progress may develop or disclose the gross impropriety of permitting it to proceed to a final conclusion detrimental to the public interest. In such a case it may be that the expense involved, when ascertained, renders it highly inexpedient to go on with the improvement. To such a case the remark of Chief Justice Beasley, in **O'Neill v. Board of Chosen Freeholders of Hudson County**, 41 N. J. L. 161, well applies: 'A man of prudence' he says 'relinquishes a project when he finds the cost is likely to exceed in a large measure its benefit; it would seem intolerably unreasonable to require the agent of the public to pursue the opposite course.'"

To a like effect see the cases cited in the annotation appearing on page 767, Ann. Cas. 1913D, and **Goszler v. The Corporation of Georgetown** (1821), 6 Wheat 593, 5 L. ed. 339, and **Hibbs v. Adams Twp.** (1900), 110 Iowa 306, 48 L. R. A. 535, 81 N. W. 584.

It seems clear that when the court of county commissioners passed a resolution authorizing the issuance of the warrants here involved for the purpose of constructing and improving roads and bridges in the county, such action did not create any vested right in the landowners or other interested parties in the county to have the contemplated improvements made, and thereby destroy the wide discretionary power of the court of county commissioners over the public roads in the county. Such a contention was made in **Thompson v. City of St. Louis** (Mo. 1923), 253 S. W. 969, where a landowner insisted that the issuance of bonds by the city for the construction of a boulevard gave rise to a contract between him and the city that the project would be completed as planned. After holding that no such contractual rights arose, the court said:

"There is another reason why appellant's contention with respect to a contract is unavailing. Had the city in express terms, for a valuable consideration, agreed with him and other property owners that it would construct a boulevard between Easton avenue and Penrose street, such contract would not have been binding on the city, because it had no power to thus hamper the free exercise of its legislative discretion. The governing authority of a municipality is not permitted to abdicate through a contract any of its legislative powers and thereby preclude itself from meeting in a proper way the emergencies that may arise. 6 R. C. L. 744."

It thus appears that if the Court of County Commissioners of Wilcox County should by appropriate resolution find that it is no longer necessary to do the work that was originally contemplated would be done with the moneys refunded to the county by the State Highway Department, or that it is impracticable or not feasible at this time to do such work, it would, therefore, have power by such resolution to rescind any resolutions previously adopted by its authorizing such work. If such should be done, then in the absence of bad faith on the part of the county no taxpayer or landowner in the county could complain thereof.

Once the work contemplated has been abandoned, the question arises as to the proper disposition of the funds which had been raised for such work by sale of the warrants. As a general rule, moneys borrowed by a governing body can be used solely for the purpose for which they are borrowed. There are a number of decisions holding that this rule itself compels the application of surplus funds not expended for the purpose for which borrowed solely to the retiring of the obligations created by the borrowing. Indeed, it is the necessary and inescapable corollary to the rule that any surplus not used for the declared purpose must be applied to the retirement of the obligations. If such were not true, then any unexpended surplus would be required to be held by the issuing body in perpetuity.

In *re Bliss* (Okla. 1930), 285 P. 73, states the rule and its necessary corollary in a discussion of the proper application of surplus funds derived from a bond issue for county highway purposes. In the course of its opinion the court said:

"The third contention under this proposition involves the application of a balance of funds received from a bond issue after the purpose for which the money was borrowed has been served. Section 16, art. 10, of the Constitution, provides: 'All laws authorizing the borrowing of money

by and on behalf of the State, county, or other political subdivision of the State, shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for no other purpose'—and under that provision money borrowed may be used only for the purpose for which it was borrowed. That provision is a restriction on the use of funds derived from a bond issue other than for the purpose for which the bonds were issued. Where the purpose for which the bonds were issued has been served, and there is a balance on hand derived from the sale of the bonds so issued, it can be used for no other purpose, and must be placed in the sinking fund for the purpose of retiring pro tanto the bonds so issued in excess of the amount needed for the purpose for which they were issued."

City of Fayetteville v. Huddleston (Ga. 1928), 142 S. E. 280, is concerned with the proper use of the proceeds of a bond issue when the purpose for which the bonds were issued had been abandoned. The charter of the city, which authorized it to issue bonds for certain purposes, provided:

" *** proceeds of such bonds when sold shall only be applied for the purposes for which they were respectively issued."

The city sold two issues of bonds, one for a waterworks system and the other for an electric light system. Subsequent thereto the city granted a franchise to a private utility for an electric system and abandoned the construction of a municipally owned electric system. The bonds issued for the water system were not sufficient to complete the water system and the city proceeded to use a part of the proceeds of the electric light bonds to complete the water system. An injunction was sought to prevent the city from so doing, and the lower court issued an injunction enjoining the city council

" *** from using, diverting, or transferring the money derived from the sale of electric light bonds for any other purpose whatever, except buying up and retiring the electric light bonds outstanding against the City of Fayetteville, or the purchase of like securities for that purpose as by law provided."

On appeal, the Supreme Court in a very strong opinion upheld the injunction so granted by the lower court.

I have been unable to find any authority whatsoever to the effect that where there is a surplus of funds not needed for the purpose for which the funds were borrowed the same cannot be applied to retire the obligations by virtue of which the funds were obtained. To the contrary, the authorities above cited establish the proposition that where a project is abandoned the governing body not only may apply but probably has the imperative duty to apply any unexpended funds derived from securities issued for the abandoned purpose toward the retirement of those securities.

In addition to the foregoing proposition as established by the decisions of the courts, Title 12, Section 12, paragraph 21, of the Code of 1940 authorizes the courts of county commissioners

"To set aside such part of the revenue of the county as may be deemed expedient for the purpose of creating a sinking fund for the payment of bonds or other indebtedness and to invest such sinking fund in such interest-bearing securities, or deposit the same on interest-bearing account, within the state, as said court may deem wise."

In my opinion, the term "revenue" as used in the quoted paragraph is sufficiently broad to include the unused revenue derived from the sale of the warrants here in question, and in view thereof the court of county commissioners is authorized, in its sound discretion, to use the moneys refunded to the county in creating a sinking fund for payment of the warrants issued by it and then invest such sinking fund moneys in said warrants.

The opportunity to acquire some of the warrants prior to their maturity will unquestionably effect a substantial saving to the county in interest. I know of no rule of law which, under the facts here involved and so long as holders of the warrants are willing to surrender the same prior to maturity, prohibits the retirement of warrants until they have matured or until all warrants of the same issue have been offered for retirement or until there are sufficient funds on hand to retire all at the same time. There is no question here of preferment of creditors by an insolvent. The warrants were issued against the anticipated receipts by the county from the state gasoline tax. That fund is in no way touched or impaired by a disbursement of the proceeds of the warrants, except that the value of the gasoline tax fund as security for payment of the warrants not retired is increased as the outstanding obligations against that fund are retired. In view thereof it may even be said that use of the excess moneys, derived from sale of the warrants and not needed for the purposes for which the warrants were issued, for retirement of the warrants is, in effect, a use of the proceeds from the sale of the warrants for the purpose for which they were issued, since the retirement of the warrants makes available for highway purposes moneys subsequently received by the county from the state gasoline tax which, except for such retirement, would have to be used for payment of the warrants so retired.

This leaves unanswered only the question of whether or not the purchase of any of the warrants, either for retirement or for a sinking fund, is controlled by the provisions of either Section 12 or Section 13 of the so-called Henderson Act (Act No. 436, Local Acts of 1939, page 261, which is applicable to Wilcox County). Section 12 of that act pertains to the sale of bonds, warrants or other property of the county and does not purport by its terms to cover any purchases. Section 13 pertains to contracts for purchases by the county but evidently refers only to such contracts for purchases as are authorized to be made for the county by the State Department of Finance or the State Highway Department or other state agency now or hereafter authorized by law. As was said in our opinion to you of December 15, 1942 (Opinions of the Attorney General, Vol. XXIX, page 96), under the terms of said act:

" *** the county may avail itself of the services of the designated State agencies and departments, or may act on its own initiative, as it deems best. This alternative choice of action would seem to apply, and to be restricted, to such contracts only as said agencies and departments are authorized by law to make in behalf of counties."

So far as I can ascertain, neither the State Department of Finance nor the State Highway Department nor any other state agency is authorized to purchase for the counties warrants or other securities either for retirement and cancellation by the counties or for their sinking funds. Accordingly, it would appear that the Henderson Act has no application to the purchase of warrants as herein contemplated. The court of county commissioners should properly make such purchases at such prices and on such terms as it in its sound discretion deems to the best interests of the county. The broad interpretation given to Title 12, Section 43 of the Code and the other statutes conferring discretionary power on courts of county commissioners compels the conclusion that the purchase of such warrants is not open to review by the courts in the absence of fraud, corruption or unfair dealing.

I am, therefore, of the following opinion: Provided the court of county commissioners shall have first adopted an appropriate resolution for the abandonment of the construction and improvement contemplated by the issuance of the warrants, it can, in the exercise of its sound discretion, validly use the excess moneys so refunded to it by the State Highway Department in the purchase of any of the said warrants at such prices and on such terms as it may deem to the best interests of the county, without the necessity of complying with the provisions of the said Henderson Act.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 18, 1943.

Hon. H. G. Dowling,
Commissioner of Revenue,
Capitol.

INCOME TAX—

1. Where the Department of Revenue furnishes a form of return to the taxpayer and he makes and files the same with the Department of Revenue, any time within two years after the filing of the return the Department may approve the same by making and entering on its record an assessment based on the return.

2. In cases shown in headnote 1 the assessment is final and no further notice is due the taxpayer.

3. As soon as such final assessment is made execution may issue thereon.

4. The mere filing of the return is not an assessment, there must be a written acceptance and approval of the return in some form that the amount of tax shown therein is correct and constitutes the sum to be paid.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion bearing date of February 23, 1943, is as follows:

“Re: Income Tax.

“In cases where the taxpayer has submitted a signed return for income tax purposes, which has been examined and ascertained by the Department to be correct, but has not paid the tax shown to be due, a question arises as to whether it is necessary for the Department to make a formal assessment, with notice of a hearing thereon, and to make such assessment final, before an execution may be issued to enforce the payment of the tax shown to be due.

“Where the signed return is ascertained and determined to be correct, and the amount of such tax liability has been entered accordingly on the books of the Department but has not been paid, there appears to be a question as to whether the two year limitation of time for making an assessment, as provided in Section 412, Title 51, Code of Alabama, 1940, applies before the issuance of an execution or the institution of a suit to enforce payment.

“Your official opinion on these questions is hereby respectfully re-

quested."

Your request for an opinion in this case presents two questions. (1) Where the taxpayer has been furnished a form by the Department of Revenue and he has made a return thereon and the Department has accepted the return as correct and made final assessment thereon within two years from the date of the return, is the Department required to notify the taxpayer that his return is correct and that a final assessment has been made against him? (2) When the return is made in such a case, what constitutes an assessment thereon by the Department of Revenue?

The language is specific and clear in Section 412, Title 51 of the Code that the Revenue Department has a period of two years after the filing of the return within which to determine that the return is correct and make a final assessment thereon to that effect. Section 407 of Title 51 provides that the income tax shall be assessed and fixed upon blanks in a form to be prescribed by the Department and that this form shall be mailed to the taxpayer. It also provides that the mailing of this blank to the taxpayer shall be the only notice required to be given except when the amount, as finally fixed by the Department, shall be different from the amount shown to be due by the return as made by the taxpayer. This same section further provides that:

"The amount shown to be due by the taxpayer's return shall constitute and create a prima facie liability for such amount on which taxes shall be paid as herein provided."

Under these provisions it is manifest that where the taxpayer makes the return and the Revenue Department finds it correct by proper order, the proper proceeding as to that return has been completed and nothing is left to be done except to collect the assessment. It would be useless to give notice to the taxpayer on such return. He brought himself within the jurisdiction of the Department of Revenue by filing the return. The remaining part of this Section 407 very clearly supports this construction by making provisions for further notice and hearing where the Department is of opinion that the return is not correct.

The second proposition stated above presents a more difficult question. What constitutes an assessment where the return is determined to be correct? The Legislature did not delegate power to state or county officials to make the levy. The Legislature made the levy. Section 373 of Title 51 of the Code makes the levy on the entire net income and requires it to be paid annually. It also fixes the rate by Section 377. Section 394 of this title requires the taxpayer to make a return each year stating specifically the items of his gross income and the deductions and credits allowed by law. This return is required to show in great detail the status of the taxpayer's entire business leaving nothing to be done by the Department of Revenue but approve or disapprove the return. If the return is approved, the Department makes the assessment.

The term "assessment" commonly includes two distinct processes. First, the preparation of a list by the proper officers comprising a description of all the persons or property liable to contribute to the tax. Second, an estimate

of the value of the property which is to be called to contribute. Such a list is denominated the tax list or assessment roll. **Town of Albertville v. Hooper**, 196 Ala. 642. This definition is more readily applied to assessment of ad valorem taxes. The Income Tax Law under review has practically relieved the tax authorities from all these requirements. The Legislature has fixed the property and persons taxable and has required the taxpayer to prepare and file the tax list—return.

On a kindred law our Supreme Court has said that the Legislature has fixed the tax periods for which the franchise tax shall be paid, it has established the rate. The return and tax periods being prescribed by law has left nothing to do but inquire as to the amount to be paid. **State v. Bradley**, 207 Ala. 677.

The Income Tax Law presents still a stronger case. The return shows the amount to be paid. The Department of Revenue simply determines the correctness of this stated amount but there must be made a record in the office of the Department of Revenue of this determination that the return is correct and accepted as the proper amount of tax. There is no stated form nor is it necessary that a formal order be made. It is sufficient if the records show in some way that the return is approved by the Department. That may be shown by writing on the return such determination or by entering on the tax records where the return is reported something showing the correctness of the return and the amount stated therein as being due. The mere filing and recording of the return is not sufficient. There must be a written record of the correctness or acceptance of the return by the Department of Revenue as exhibiting the proper amount of tax. **Town of Albertville v. Hooper**, 196 Ala. 642.

While it is not necessary to make and record a formal assessment, much confusion, objections and possible litigation may be avoided by making such formal assessment.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 19, 1943.

Hon. Howell Turner,
Secretary of State,
Montgomery, Alabama.

Code 1940, Tit. 10, §§ 11, 37—Tit. 2, §§ 113, 132—Corporations—
Increase of Capital Stock—Cooperative Associations—Amendment of
Articles—Fees—

1. Upon increase of capital stock of a corporation and report thereof to the Secretary of State as required by Title 10, § 37, no fee is payable for the filing of such report, for the use of the State.

2. Fees of \$2.50 payable upon amendment of the articles of incorporation of cooperative associations under Title 2, §§ 113, 132, are paid to the probate judge for the use of the State and should be by him reported and paid, as provided in Title 10, Section 8, Code 1940, in the same manner as licenses issued by the probate judge.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your two requests for official opinions bearing date of March 13, 1943, are as follows:

"In pursuance of Section 6972 of the Code of 1923 reports of increase of capital stock of domestic corporations have been for years reported to this office without any fee collected by the judges of probate and attached as a filing fee. No provision appears to have been made for the collection of a filing fee by the judges of probate for reporting an increase to this office, and, therefore, none was collected.

"Title 10, Section 37, Code of 1940, supersedes Section 6972 of the Code of 1923 and I refer you to the difference in these sections. Title 10, Section 37, now provides that the probate judge shall 'cause to be filed in the office of the Secretary of State a statement of like nature as that provided for in Section 11 of this title.' No mention is made of any \$2.50 filing fee collected by this office for a report of increase.

"Your attention is directed to Volume 26, Quarterly Report of the Attorney General, page 19, in which the Judge of Probate of Montgomery County inquired as to whether a \$2.50 examination fee should be collected by him in pursuance of the Code of 1940, Title 10, Section 37, for increasing the capital stock. You will note further that the Attorney General advised him that he should collect the \$2.50 examination fee but no mention was made of his collecting a \$2.50 filing fee to be sent to the Secretary of State.

"We will appreciate your advising whether a \$2.50 filing fee for reporting an increase in capital stock of a domestic corporation should be

sent to this office."

Your second letter is as follows:

"We will appreciate an opinion from you with reference to the filing fee of \$2.50 by the Probate Judge in pursuance of Title 2, Section 113, of the Code of Alabama of 1940. Will you please advise whether this fee is retained by the Probate Judge, whether it is sent to the Comptroller or whether it should be sent to the Secretary of State.

"Similar information is requested also with reference to the \$2.50 filing fee referred to in Title 2, Section 132, Code of 1940."

The question is whether reference in Section 37 to Section 11, of Title 10, requiring the probate judge to file with the Secretary of State a report, or statement, of the increase of capital stock, as provided for in Section 36, is sufficient to impose a fee of \$2.50, payable for such record, or statement, of increase.

Said Section 11 requires the payment of such a fee for the use of the State upon original incorporation and report thereof to the Secretary of State. Said Section 37 requires the report of increase of stock to follow the form or to be "of like nature as that provided for in Section 11." It does not expressly provide, however, as does Section 11, "that there shall be paid, in advance, to the probate judge, for the use of the State, a fee of two and a half dollars."

The purpose of the reference in Section 37 to Section 11 was to indicate the nature, form and contents of the report required by the former section. It was to be of "like nature" as that prescribed by Section 11, by showing the name of the corporation, etc. and the other material particulars involved upon an increase of capital stock under Section 36. But we search in vain for any indication that was the "legislative intent" also to fix a fee of \$2.50 or any other amount for and on account of the report to be filed under Section 37. Such intent cannot arise by surmise or implication. To be effective it must be express. **Mobile County v. Williams**, Judge, 180 Ala. 639, 647, 61 So. 963.

In an opinion of this office rendered October 7, 1929, to the Chief Examiner of Accounts (**Biennial Report, Attorney General, 1928-1930**, p. 669) it was ruled that under Code 1923, § 7155, fees therein fixed, upon organization of cooperative marketing associations, or upon amendment of their articles of incorporation, as the case might be, were payable to the State, being in the nature of charter fees paid by ordinary business corporations upon original incorporation or increase of capital stock. See also **Biennial Report, Attorney General, 1934-1936**, p. 62.

Said section 7155 of the 1923 Code is reproduced without change in the Code of 1940 as Section 113 of Title 2. I conclude therefore that the \$2.50 fee therein referred to, payable upon "amendment to the articles," should be paid to the State in the manner hereinafter indicated.

With reference to Title 2, Section 132, providing for a fee of \$2.50 "for filing an amendment to the articles"—viz., articles of incorporation for another variety of cooperative (Title 2, §§ 115, et seq.), the same reasoning applies, and that fee is likewise payable for the use of the State.

Inasmuch as these fees under Sections 113 and 132, supra, are substitutes for the ordinary charter fees of one dollar per thousand of capital stock for business corporations, payable upon incorporation thereof, or upon increase of capital stock, (Code 1940, Tit. 10, §§ 6, 37), for the use of the State, it is my opinion, in the absence of express statutory provision to the contrary, that they should be paid in the same manner as that provided for payment of charter fees by Section 8 of Title 10, to wit: "Such fees shall be reported to the department of finance and the money paid into the treasury in the same manner as licenses issued by the probate judge are required to be reported and the money paid into the treasury."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 22, 1943.

Hon. T. C. Garner, Treasurer,
Treasurer's Department,
Jefferson County,
Birmingham, Alabama.

Inferior Courts—Filling of Vacancies in Office of Judges—Local Acts of 1927, page 202—Article VI, Section 139, Constitution 1901—Title 41, Section 176, Code of Alabama 1940.

1. Article VI, Section 139, Constitution 1901 has no application to the filling of vacancies in the office of Judges of Inferior Courts of law and equity.

2. Local Acts of 1927, page 202, which Act established the Inferior Court of Leeds not having prescribed how vacancies in the office of Judge of said Court should be filled, and there being no provision of law for the filling of said vacancies, such vacancies should be filled by appointment of the Governor under the provisions of Title 41, Section 176, Code of Alabama 1940; such appointees, under the provisions of said Section 176, hold "their offices for the unexpired term and until their successors are elected and qualified."

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of February 27, 1943, is as follows:

"I now have in my possession vouchers issued by the county commission of this county covering the salary of the judge of the Inferior Court of Leeds and which are payable to J. W. McCraney.

"This office was formerly held by one McCoy Whitmire, who tendered his resignation which was accepted on, to-wit, March 15, 1942. Upon the acceptance of his resignation, the Governor appointed Mr. J. W. McCraney to this office. Subsequently Bill Armstrong duly qualified as a candidate for this office and in the election held on November 3, 1942, he received the approval of the voters. In that election he was unopposed.

"Each of these parties claims that he is the duly constituted judge of the court and each of them makes claim upon me for the salary. I have been put on notice by Bill Armstrong that he is the duly elected judge and that I should not pay the salary to J. W. McCraney.

"The question would seem to be whether Judge McCraney's appointment would extend to the expiration of the term of office of the preceding elected judge of said court, or whether it was incumbent upon him to

run in the general election held on November 3rd. I would like very much for you to advise me as to whether Bill Armstrong or J. W. McCraney is the duly constituted judge of said court.

"For your information, the act establishing said court may be found in the 1927 Local Acts, page 202."

In addition to the information contained in your request I obtained the following information from the office of Secretary of State:

- (1) That Bryant A. Whitmire was elected Judge of the Inferior Court of Leeds, Alabama, in the general election held on November 5, 1940.
- (2) That McCoy Whitmire was appointed Judge of said Court on June 18, 1941.
- (3) That J. W. McCraney was appointed Judge on March 9, 1942, and was commissioned on March 12, 1942.
- (4) That Bill Armstrong, who you state was elected Judge of said court on November 3, 1942, was commissioned on February 5, 1942.

The Legislature of Alabama is vested with the authority to establish Inferior Courts by Article VI, Section 139 of the Constitution of 1901, which section is as follows:

"The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such courts of law and equity inferior to the supreme court and to consist of not more than five members, as the legislature from time to time may establish, and such persons as may be by law invested with powers of a judicial nature; but no court of general jurisdiction, at law or in equity, or both, shall hereafter be established in and for any one county having a population of less than twenty thousand, according to the next preceding federal census, and property assessed for taxation at a less valuation than three million five hundred thousand dollars."

Article VI, Section 153, Constitution of Alabama 1901, is as follows:

"The judges of such inferior courts of law and equity as may be by law established, shall be elected or appointed in such mode as the legislature may prescribe."

Article VI, Section 168, Constitution of Alabama 1901, provides as follows:

"In each precinct not lying within, or partly within, any city or incorporated town of more than fifteen hundred inhabitants, there shall be elected by the qualified electors of such precinct not exceeding two justices of the peace, and one constable. Where one or more precincts lie within, or partly within, a city or incorporated town having more than

fifteen hundred inhabitants, the legislature may provide by law for the election of not more than two justices of the peace and one constable, for each of such precincts, or an inferior court for such precinct or precincts, in lieu of all justices of the peace therein. Justices of the peace, and the inferior courts in this section provided for shall have jurisdiction in all civil cases where the amount in controversy does not exceed one hundred dollars, except in cases of libel, slander, assault and battery and ejectment. The Legislature may provide by law what fees may be charged by justices of the peace and constables, which fees shall be uniform throughout the state. The right of appeal from any judgment of a justice of the peace, or from any inferior court authorized by this section, without the prepayment of costs, and also the term of office of such justices, and of the judges of such inferior courts, and of notaries public, shall be provided for by law. The governor may appoint notaries public without the powers of a justice of the peace, and may, except where otherwise provided by an act of the legislature, appoint not more than one notary public with all the powers and jurisdiction of a justice of the peace for each precinct in which the election of justices of the peace shall be authorized."

The Inferior Court of Leeds was established by Local Acts of Alabama 1927, page 202. Sections 1 and 3 of this act provide as follows:

"Section 1. That there is hereby established and created an inferior court in Precinct Twelve of Jefferson County, Alabama, said precinct lying within or partly within the town of Leeds, Alabama, which court shall be known and designated as the Inferior Court of Leeds, which shall be held in Leeds, Alabama, at such place as is provided for holding same. The said court shall have all the powers and jurisdiction now conferred by law on Justices of the Peace, of said precinct, or that may hereafter be conferred by law upon Justices of the Peace or on said court; and the Judge of said Court shall have and exercise all the power and authority and perform all the duties now prescribed by law, or that may hereafter be prescribed by law for Justices of the Peace in said precinct. Said Judge shall have the same rights and privileges and the said disabilities and penalties, as now or may hereafter apply to Justices of the peace, except as herein provided."

"Section 3. The Judge of said Court shall be appointed by the Governor within twenty (20) days after the approval of this Act and shall hold office until the next general election in November, 1928, when his successor shall be elected by the qualified electors of Precinct Twelve (12) of Jefferson County, and his successor elected at that time shall hold office for four (4) years and until his successor is elected and qualified. Such judge shall be at least twenty-one (21) years of age, shall be licensed to practice law, a qualified elector, and shall have resided in said Precinct for at least twelve (12) months. Said judge shall give bond and surety as now required by law of Justices of Peace."

From an examination of the above set out sections of the Local Acts of 1927 it will be seen that the Inferior Court of Leeds was established in lieu of Justice Court, and that the term of office of the Judge of said Court was "for four (4) years and until his successor is elected and qualified."

It will be seen from the information set out above that Bryant A. Whitmire was elected Judge of the Inferior Court of Leeds in the general election held on November 5, 1940. Under Section 3 of the Local Act of 1927, *supra*, his term of office was for four years and until his successor is elected and qualified. Therefore, the term of office for which he was elected will not expire until November, 1944.

The question presented by your inquiry is whether the appointment of J. W. McCraney, who was appointed on March 9, 1942, was for the unexpired term of Bryant A. Whitmire, who was elected on November 5, 1940, for a term of four years, or was such appointment only to extend to the general election held on November 3, 1942.

In the case of *State ex rel Winter v. Sayre*, 118 Ala. 1, 24 So. 89 (1897), which was a proceeding in the nature of quo warranto to test and determine claims to the office of the Judge of the City Court of Montgomery, the Court held:

(1) That under the Constitution, Inferior Courts of law and equity are of legislative creation, deriving their vitality and existence from legislative power granted by the Constitution.

(2) That such courts are distinguished from all other courts to which the Constitution refers.

(3) That the Constitution of 1875 by the provisions of Article VI, expressly reserves to the Legislature the power to provide the manner in which Judges of Inferior Courts shall be elected or appointed, and to prescribe the tenure of office of such Judges, and how vacancies occurring therein shall be filled.

(4) That Section 17 of Article VI of the Constitution of 1875, providing that "vacancies in the office of any of the Judges or chancellors of this State shall be filled by appointment by the Governor, and such appointee shall hold his office for the unexpired term, and until his successor is elected or appointed and qualified," has no application to Judges of Inferior Courts of law and equity.

(5) That the Governor is not vested by the Constitution with powers to fill vacancies by appointment occurring in the offices of such Judges, and the extension of such power to the Governor by a construction would be a limitation upon the power granted to the Legislature by the Constitution to provide the mode of election or appointment of Judges of the Inferior Courts of law and equity, to fix the tenure of such Judges, filling of vacancies that might occur in such offices.

The above case was cited with approval in the case of *State ex rel Coffin v. Hamilton*, 225 Ala. 79, 142 So. 71, in which the court held that under the provisions of Section 153 of the Constitution of 1901 it was within legislative competency to prescribe how and by whom the Judges of Inferior Courts shall be selected.

Section 158, Article VI, Constitution of 1901, is the corresponding section to section 17 Article VI Constitution of 1875, which said section 17 was in force when the case of *State ex rel Winter v. Sayre*, supra, was decided, is as follows:

"Vacancies in the office of any of the justices of the supreme court or judges who hold office by election, or chancellors, of this state shall be filled by appointment by the governor. The appointee shall hold his office until the next general election for any state officer held at least six months after the vacancy occurs, and until his successor is elected and qualified; the successor chosen at such election shall hold office for the unexpired term, and until his successor is elected and qualified."

The only substantial change that was made in Section 17, Article VI of the Constitution of 1875 by Section 158, Article VI of the Constitution of 1901 was in the length of time that an appointee should hold office. No change was made in said Section 17 which would in any way affect the decision of the court in the case of *State ex rel Winter v. Sayre*, supra.

The Legislature in establishing the Inferior Court of Leeds had the authority under the Constitution to prescribe how vacancies occurring in the office of the Judge of said court should be filled. However, the Local Act establishing said court made no provisions as to how such vacancies should be filled.

The case of *State ex rel Winter v. Sayre*, supra, having held that Section 17, Article VI, of the Constitution of 1875 (Section 158 Article VI of the Constitution of 1901) had no application to the appointment of Judges of Inferior Courts of law and equity, the Local Act of the Legislature creating the Inferior Court of Leeds not having prescribed how vacancies in the office of Judge of said Court should be filled, and there being no provision of law for the filling of said vacancies, such vacancies must be filled under the provisions of Title 41, Section 176, Code of Alabama 1940, which section is as follows:

"§ 176. Vacancies in state and county offices; how filled; term of office.—Vacancies in all state and county offices are filled by appointment of the governor, except as otherwise provided; the appointees must be commissioned, and they shall hold their offices for the unexpired term, and until their successors are elected and qualified."

Under the above Code section a vacancy occurring in the office of Judge of the Inferior Court of Leeds is properly made by the Governor, and such appointment is for the unexpired term of such office and until a successor is elected and qualified.

Premises considered it is my opinion that the appointment of J. W. McCraney as Judge of the Inferior Court of Leeds on March 7, 1942, was for the unexpired term of Bryant A. Whitmire, who was elected in the general election held on November 5, 1940, and whose term of office will not expire until November, 1944.

It follows that J. W. McCraney is the duly constituted Judge of said

Court. There being no vacancy in the office of the Judge of the Inferior Court of Leeds on November 3, 1942, the election of Bill Armstrong on said date as Judge of said Court is a nullity.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 26, 1943.

Hon. E. B. Norton, Superintendent,
State Department of Education,
Capitol.

County Board of Education—Employees—Assignment of unearned salary—Garnishment—

1. Assignment by employee of County Board of Education of unearned salary void.

2. As between such assignment and subsequently issued writ of garnishment against County Board of Education to condemn salary of an employee, the garnishment will prevail.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of March 22, 1943, is as follows:

"Your opinion is requested on the following questions:

"1. If an employee of a county board of education gives orders against his future salary, assigning it to another party, must the county board of education recognize that order and pay his future salary to said party in accordance with the assignment?

"2. If an employee of a county board of education has assigned his future salary to another party and subsequently writ of garnishment has been secured against the salary of said employee, which takes precedence: the assignment or the writ of garnishment?"

Assignments by public officers and employees of unearned compensation are void and contrary to public policy in that they tend to impair efficiency. 5 C. J. 872, § 42 (70); Ex Parte Stewart, 185 Ala. 216, 64 So. 36; Stewart v.

Sample, 168 Ala. 270, 53 So. 182; **Schloss v. Hewlett**, 81 Ala. 266, 1 So. 263.

The rule is of broad, comprehensive application, and has been held to apply not only to county tax assessors, clerks, prosecuting attorneys and sheriffs, but also to mail carriers, army officers, policemen and municipal firemen. 5 C. J. 873-4. Inasmuch as public education is a well recognized function of state government it would seem only reasonable to hold that the rule applies also to an employee of a county board of education whose services are compensated by payment of salary.

For answer therefore to your first question I am of opinion that the county board of education should not recognize orders with respect to, or assignments of, the unearned salaries of its employees.

Inasmuch as assignments of unearned salaries of employees of county boards of education are void, I am of opinion that as between such assignments and subsequently issued writs of garnishment the latter will prevail.

At common law the salary of a public employee was not subject to garnishment, but the rule has been abolished by statute. Code 1940, Tit. 7, §§ 1032-1037. **Smith v. City of Mobile**, 230 Ala. 584, 162 So. 361. **Worthington v. City Board of Education**, 228 Ala. 660, 154 So. 796; **Shepherd v. Jones**, 228 Ala. 307, 153 So. 223.

Your inquiries are in such general terms that I am unable to answer more definitely. This opinion is based upon the assumption you have used the word salary in its generally accepted definition of "an agreed compensation for services, payable at regular intervals, fixed, annual, or periodical payment for services, depending upon the time, and not the amount of service rendered," as distinguished from wages. **Smith v. City of Mobile**, supra, 585.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

March 29, 1943.

Hon. H. G. Dowling,
Commissioner of Revenue,
Capitol.

Department of Revenue—Counsel—Assistant Counsel—Traveling Expenses—Title 41, Section 154; Title 51, Sections 120, 121, 122 and 130; Title 55, Section 238, Code of Alabama 1940.

Legal Counsel and Assistant Counsel of the Department of Revenue are not subject to provisions of Title 41, Section 154, Code of Alabama 1940, which section limits "the amount allowable to persons traveling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expense of transportation" to three dollars per diem.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of March 18, 1943, is as follows:

**"IN THE MATTER OF TRAVELING EXPENSES INCURRED BY
MEMBERS OF THE LEGAL DIVISION OF THE DEPARTMENT OF
REVENUE**

"Section 154, Title 41 of the 1940 Code of Alabama fixes the maximum amount of traveling expenses allowed to persons traveling in the service of the State of Alabama, or any of its agencies or institutions, at \$3.00 per diem. But it expressly excludes the Attorney General and Assistant Attorneys General from the limitations.

"The provisions of Sections 120, 122, and 123, Title 51 of the 1940 Code of Alabama, authorize the appointment of Legal Counsel and Assistant Legal Counsel to the Department of Revenue, prescribe their qualification, tenure of office, fix their duties, and expressly require each to be commissioned Assistant Attorney General and each is so commissioned.

"Section 121, Title 51 of the 1940 Code of Alabama, provides, in part, as follows:

"The legal counsel shall be furnished with an office, necessary stenographic and clerical help, office equipment and supplies, and shall be allowed reasonable traveling expenses when traveling on business of the State."

"Section 122, Title 51 of the 1940 Code of Alabama, provides, in part, as follows:

"The acts of the assistant counsel shall be recognized as the acts of the legal counsel."

"Section 123, Title 51 of the 1940 Code of Alabama, provides, in part, as follows:

"Such legal counsel shall appear for the State in all matters of litigation of the State, involving taxes, both civil and criminal, when authorized to do so by the Commissioner and the attorney general."

QUERY

"Kindly advise me, in view of the foregoing, if the Legal Counsel and Assistant Counsel of the Department of Revenue are subject to the provisions and limitations of Section 154, Title 41 of the 1940 Code of Alabama, which limits the actual expenses to the sum of \$3.00 per diem, while traveling for and in behalf of the State."

Title 41, Section 154, Code of Alabama 1940 to which you refer in your request provides in part as follows:

"§154. Limitation of per diem expenses.—The maximum amount allowable to persons traveling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expense of transportation shall be three dollars per diem; provided, however, that in the following cases such limitations shall not prevail, but actual and necessary expenses shall be allowed except as otherwise provided:

* * *

"5. The attorney general and assistants attorney general."

It is my opinion that the legal counsel and assistant counsel of the Department of Revenue are not subject to the provision of Section 154, *supra*, which section limits the "amount allowable to persons traveling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expense of transportation" to three dollars per diem.

Title 51, Section 130, Code of Alabama 1940 provides in part as follows:

"§130. Traveling expenses.—The commissioner of the department of revenue, and the secretary of the department, and all stenographers, experts, engineers, and assistants who may be employed by the department, shall be entitled to receive their actual expenses while traveling or acting on the business of the department, such expenses to be itemized and sworn to by the person who incurs the same, and vouchers attached as now provided by law, and shall be approved by said department, and also by the governor, such expenses not to exceed any maximum fixed by law. *** "

The above set out section was originally Section 91 of the Revenue Act of 1935 (General Acts of Alabama 1935, page 298).

The act creating the office of legal counsel for the Department of Revenue was passed by the Legislature in 1939. See General Acts of Alabama 1939, page 5. This act was brought forward into the Code of 1940 under Title 51, Sections 119-124.

While under Title 51, Section 130, *supra*, (which section was Section 91 of the Revenue Code of 1935, General Acts of Alabama 1935, page 298) employees of the State Department of Revenue are limited to three dollars per diem for expenses other than actual expenses for transportation, as provided by Title 41, Section 154, *supra*, under Title 51, Section 121, Code of Alabama 1940 (which was originally Section 3 of the act creating the office of legal counsel for the Department of Revenue, General Acts of Alabama 1939, page 5) it is expressly provided that the legal counsel "shall be allowed reasonable traveling expenses, when traveling on business of the State." It is, therefore, apparent that it was the intention of the Legislature in the passage of the act creating the office of legal counsel for the Department of Revenue, that the legal counsel should not be subject to the three dollars per diem limitation for expenses as provided by Title 41, Section 154, *supra*.

No express provision is made for the traveling expenses of the assistant counsel, however, under the provisions of Title 51, Section 122, Code of Alabama 1940, which provides for the appointment of an assistant counsel, such assistant counsel is charged with the same duties as the legal counsel, and his acts shall be recognized as the acts of the legal counsel. For this reason the assistant counsel should be allowed the same traveling expenses as are allowed to the legal counsel.

Title 51, Section 120, Code of Alabama 1940, provides that the legal counsel shall be commissioned as an assistant attorney general. Section 122 of said Title contains a similar provision in regard to the assistant counsel. These provisions further bear out my conclusion. Title 55, Section 238, Code of Alabama, 1940, provides that the Attorney General and his assistants may incur such traveling expenses in the performance of their duties as may be necessary. Title 41, Section 154, Code of Alabama 1940, expressly provides that the Attorney General and the assistant attorneys general are not subject to the limitation of three dollars per diem for expenses other than actual expenses of transportation, but actual and necessary expenses shall be allowed.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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